Supreme Court, U.S.
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In The
Supreme Court of the United States

LEE CALEY, *et al.*,

Petitioners,

v.

GULFSTREAM AEROSPACE CORPORATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a waiver of the procedural rights available in actions to enforce the Fair Labor Standards Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act and Title VII of the 1964 Civil Rights Act, including the right to trial by jury, be demonstrably knowing and voluntary?

PARTIES

The named petitioners are Lee Caley, Steve Bacon, John Baker, William Etzel, Marlon Green, Dianne Jackson, Willie Mae Stewart, Robert Vouk and Stanley Walker. The named petitioners brought two actions, consolidated in the district court, on behalf of two distinct classes composed of several hundred current and former employees of the Gulfstream Aerospace Corporation in Savannah, Georgia.

The defendants are the Gulfstream Aerospace Corporation and the General Dynamics Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Lee Caley, et al., respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on October 31, 2005.

OPINIONS BELOW

The October 31, 2005, opinion of the court of appeals, which is reported at 428 F.3d 1359 (11th Cir. 2005), is set out at pp. 1-34 of the Appendix. The August 24, 2004, order of the district court, which is reported at 333 F. Supp. 2d 1367, is set out at pp. 35-54 of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on October 31, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

This case arises out of efforts by the Gulfstream Aerospace Corporation to bring an end to lawsuits by its workers under federal employment (and other) statutes, and to replace those lawsuits in certain circumstances with mandatory arbitration under terms fixed and controlled by

Gulfstream itself. The events in question concern employees at the Gulfstream plant in Savannah, Georgia.

In the summer of 2002 Gulfstream set out to substitute for most legal actions by employees a system of administrative measures, including under some circumstances mandatory arbitration, known as the Dispute Resolution Policy ("DRP"). To achieve that end, however, Gulfstream did not ask its employees to sign an agreement providing for arbitration in place of litigation. Rather, in July 2002, Gulfstream sent to its workers a document with the following heading:[1]

GULFSTREAM AEROSPACE CORPORATION
CORPORATE POLICY MANUAL

DISPUTE RESOLUTION

Policy No. CP-6-056 Effective Date: 08/01/02

The first sentence of the text stated "This policy ('DRP' or the 'Policy') *applies* to all current employees of Gulfstream Aerospace Corporation."[2] The fourth sentence stated:

> [O]ccasionally, informal efforts do not resolve an employee's dispute, and in such cases an employee must submit his or her dispute to the DRP when the claim is covered by the DRP as defined herein. . . .[3]

The document then described a four-part dispute resolution process; the last step in that process is mandatory arbitration. A modified version of the document was sent to workers in March 2003. (In the decisions below both the

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[1] Affidavit of Jim Sanders, Ex. 1.

[2] *Id.* (emphasis added).

[3] *Id.*

document itself, and the dispute resolution process which it established, are referred to as the DRP.)

The DRP consists of ten printed single-spaced pages; the 5,500 words (except for the headings) are in 10-12 point type. In the middle of the third page is the following provision:

> *Acceptance/No Change in Terms of Employment*
>
> The submission of an application, acceptance of employment or continuation of employment by an individual shall be deemed to be acceptance of the DRP. No signature shall be required for the Policy to be applicable. The mutual obligations set forth in this DRP shall constitute a contract between the Employee and the Company but shall not change an Employee's at-will relationship or any term of any other contract or agreement between the Company and Employee. This Policy shall constitute the entire agreement between the Employee and Company for the resolution of Covered Claims.[4]

In the proceedings below, Gulfstream contended that because of this paragraph – particularly the three words "continuation of employment" – the DRP was not simply a company policy. Rather, Gulfstream argued that under Georgia law the DRP was technically an offer of a contract, and that all employees at the Savannah plant accepted that offer merely by failing to resign immediately after receiving copies of the 2002 and 2003 versions of the DRP.[5] Gulfstream did not ask its employees to sign the DRP or any other document, or to respond affirmatively in any other way. Gulfstream's counsel explained that the company had chosen instead simply to distribute the DRP,

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[4] App. 4.

[5] Brief for Defendants-Appellees, p. 15.

with the above quoted paragraph, because that was "a permissible (and practical) way to facilitate acceptance."[6]

In addition to distributing copies of the DRP to the plant employees, Gulfstream communicated to them in several other ways. Company personnel officials were directed to handle the matter in a "low impact" manner, and to avoid causing "a splash."[7] A flyer simply described the DRP as a "policy," with no reference to any offer, acceptance, or contract.[8] One letter described the events of the summer of 2002 (when the DRP was first distributed) simply as the implementation of a policy by Gulfstream itself.[9] Another letter stated:

> The DRP will become the exclusive procedure to resolve covered workplace disputes – so you should carefully read the enclosed brochure. This policy, which will become effective on August 1, 2002, will be a condition of continued employment. All covered claims will be subject to this DRP at that time.

(App. 3). The letter did not explain the phrase "condition of continued employment," did not suggest there was any action an employee could or should take (such as resigning to avoid coverage by the DRP) other than to read the "enclosed brochure," or indicate that there was anything whatever an employee could do if he or she did not want his or her claims to "be subject to this DRP." The accompanying brochure stated simply that "You *must* use the DRP to

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[6] Brief for Defendants-Appellees, p. 15.

[7] Declaration of Dianne Jackson, p. 8.

[8] Affidavit of Greg Dziuban, Ex. 5.

[9] *Id.* ("Effective August 1, 2002, Gulfstream Aerospace Corporation implemented a Dispute Resolution Policy ('DRP') for the resolution of workplace disputes involving legal claims through the DRP.")

address a 'covered claim;'"[10] the brochure referred to the DRP only as a "policy," never as a contract or agreement.

The DRP itself contained a number of procedural provisions, decidedly unfavorable to the employee, which differed sharply from the procedures that would be followed in federal or state court. (1) By substituting judicial redress for arbitration by an arbiter, the DRP (if binding) ended a worker's right to a jury trial. (2) The DRP forbade class actions or collective actions in arbitration. (3) The DRP forbade joining the claims of two or more employees in the same arbitration.[11] (4) The DRP forbade disclosure of anything that occurred during arbitration; thus evidence of discrimination unearthed in one arbitration could not be revealed to another employee who might have been injured by the same violation of federal law. (5) An aggrieved employee could not simply ask for arbitration. Rather, he or she first had to complete three preliminary administrative steps. At the end of each step, the employee is required within 30 days to file a request to proceed to the next level; an employee who misses any of these three 30-day deadlines "will waive his or her rights to pursue his or her covered claims." Such an employee would thus be barred from arbitration. (6) An employee who invoked step 1 of the DRP process by meeting with a Human Resources official was required at that time to submit "all Covered Claims."[12] "[A]ny failure to

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[10] Affidavit of Jim Sanders, Ex. 1, "Dispute Resolution Policy Questions and Answers," Question 3 (emphasis added).

[11] This provision was not in the 2002 DRP.

[12] Under the DRP "covered claims" includes the vast majority of the claims that an employee could have against Gulfstream or its managers, including "[t]ort claims," "[c]laims based on express or implied contracts," "claims relating to involuntary terminations" and "[e]mployment discrimination and harassment claims, based on, for example, age, race, sex, religion, national origin, veteran status,

(Continued on following page)

bring all covered Claims . . . shall waive the covered Claims in existence at the time of the initial filings." Thus a meeting with a Human Resources official regarding any matter that constituted a "covered claim" automatically worked a forfeiture (including a bar to arbitration) of every other accrued claim the employee then had but failed to raise at that meeting.[13] (7) Gulfstream reserved the right to unilaterally modify any provision of the DRP at any time, provided that it gave its employees 30 days written notice.[14]

The 2003 version of the DRP was sent to Gulfstream employees in March of that year, and became effective on April 10, 2003. (App. 7). *The next day*, April 11, 2003, Gulfstream without prior warning laid off more than a hundred workers at the Savannah plant. (App. 8 n.4). Those layoffs were part of a reduction in force, and have proven permanent.

In November 2003, two separate actions were filed against Gulfstream and its parent corporation, General Dynamics, regarding employment practices at the Savannah plant. One action (the *Jackson* complaint) was a collective action[15] alleging that the defendants had selected workers for the April 11 layoffs on the basis of age, in violation of the Age Discrimination in Employment Act; the *Jackson* complaint also asserted an ERISA claim on behalf of a class of workers, included certain Georgia-law contract claims, and alleged individual claims involving violations of Title VII and the Fair Labor Standards Act.

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citizenship, disability or other characteristic protected by law [and] [r]etaliation claims for legally protected activity."

[13] This provision was not included in the revised March 2003 DRP.

[14] Such a modification would not apply to an already pending claim.

[15] An ADEA collective action is in effect an opt-in class action, as is a collective action under the Fair Labor Standards Act.

The other action (the *Caley* complaint) asserted claims on behalf of a class of two hundred workers under the Fair Labor Standards Act. (App. 7-8). All of the claims in these actions are "covered claims" within the scope of the DRP.

The defendants, relying on the DRP, filed motions to dismiss both actions and to compel arbitration. The *Jackson* complaint and the *Caley* complaint were treated as related actions and heard together by a single judge. (App. 8).

The plaintiffs argued that the arbitration requirement in the DRP was not binding on the Gulfstream employees. In the courts below, the parties disagreed about the legal standard to be applied in determining whether the DRP constituted a valid agreement by the Gulfstream employees to submit all covered claims to binding arbitration. The plaintiffs contended that any agreement to waive the remedial provisions of the four federal statutes involved – including in certain instances the right to a jury trial – must be knowing and voluntary.[16] The defendants insisted that such waivers need not be either knowing or voluntary; all that was required, they argued, was that under Georgia law the DRP constituted an offer to contract, and that under Georgia law the failure of the Savannah plant workers to resign constituted an acceptance of that offer.[17]

The applicable standard was of controlling importance. The defendants did not contend, for example, that all (or necessarily any) Gulfstream employees had actually read the "Acceptance/No change in Terms of Employment" paragraph on page 3 of the DRP, or actually knew when they failed to resign following receipt of the DRP that by so doing they

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[16] Plaintiffs' Preliminary Response and Brief in Opposition to Defendant's Motion to Compel, pp. 27-32; Brief of Appellants, pp. 18-28.

[17] Defendants' Supplemental Brief in Support of Motion to Compel, pp. 7-8; Brief for Defendants-Appellees, pp. 23-24.

might be agreeing to a contract. To the contrary, on the view of the law advanced by the defendants, the actual knowledge of its employees simply was not relevant. According to counsel for Gulfstream, an employee who failed to resign after receiving an envelope with the DRP ipso facto entered into a contract to waive arbitration, even if he or she "didn't read it [and] it went right in the trash."[18] The employees' "continuation of their employment after *receipt* of the DRP constituted acceptance."[19]

The district court concluded that any waiver of an employee's procedural rights under the four federal statutes in question, or of the right to a jury trial, need not be either knowing or voluntary. (App. 43 n.6). To the contrary, the district judge concluded that federal law "does not prohibit employers from *requiring* mandatory arbitration of employment disputes as a condition of employment." (App. 52) (emphasis added). The district court held that under Georgia law the DRP constituted an offer to enter into a contract, and that under that state's law continuing to work after receiving a copy of the DRP constituted an acceptance of that offer. (App. 50).

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[18] Transcript of Chambers Conference, April 16, 2004, pp. 27-28.

[19] Brief for Defendants-Appellees, p. 34 (emphasis added); *see id.* at 39 ("Appellants' continued employment following *receipt* of the DRP constituted their acceptance of the terms and conditions of the DRP, including arbitration.") (emphasis added), 40 ("each Appellant accepted the DRP when each continued employment after *receiving* the DRP.") (emphasis added), Defendants' Supplemental Brief in Support of Motion to Compel, p. 9 ("Plaintiffs continued to work at Gulfstream following *receipt* of the DRP. Plaintiffs thus accepted the terms and conditions of the DRP.") (emphasis added), 12 (the named plaintiffs *received* the DRP and then returned to work prior to filing their claims. The DRP is enforceable") (emphasis added), 14 (the named plaintiffs "*received* the DRP and continued working at Gulfstream. . . . Plaintiffs are therefore required to arbitrate their claims.") (emphasis added).

The court of appeals affirmed. The Eleventh Circuit held that a contractual waiver of the right to jury trial (or of any of the other procedural rights available in litigation under the four federal statutes at issue) need not be knowing or voluntary. (App. 17). It noted that the Sixth and Ninth Circuits had reached the contrary conclusion. (App. 21 n.14). The Eleventh Circuit also rejected the standard utilized by the First Circuit in evaluating the validity of such waivers. (App. 26 n.18). The court of appeals held that under Georgia law the DRP constituted an offer to contract and that the failure of the Gulfstream employees to resign after receiving a copy of the DRP constituted acceptance of that offer.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS AND STATE COURTS ARE IN CONFLICT REGARDING THE STANDARD FOR DETERMINING WHETHER EMPLOYEES HAVE WAIVED THEIR PROCEDURAL RIGHTS UNDER MAJOR FEDERAL EMPLOYMENT STATUTES

This case presents a well-established, complicated and widely-recognized conflict among the lower courts regarding the legal standard for determining when a plaintiff has waived his or her procedural rights in actions under federal statutes, particularly the right to jury trial. The specific issue is whether any such waiver must be *knowing and voluntary*.[20] That question arises most frequently, although not

[20] The American Arbitration Association insists that arbitration agreements should be "knowingly made." American Arbitration Association, Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (1995).

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exclusively, with regard to the procedural rights which are lost if a case is to be resolved by arbitration rather than in court. Eleven federal circuits have addressed this question, reaching widely divergent conclusions. Two federal courts of appeals insist that the Federal Arbitration Act bars the state courts from imposing a "knowing and voluntary" requirement; the highest courts of eight states, however, have done so.

Employers which prefer arbitration of employment disputes have taken very different approaches to their employees. Some employers have merely sought to persuade their workers to agree voluntarily to arbitration, offering arbitration plans which those employees are entirely free to accept or reject.[21] Other employers have directly compelled their workers to agree. In certain cases, employees have been directed to sign an employer-drafted arbitration agreement, and expressly told that they will be dismissed if they do not to sign; employees who refused have indeed been fired.[22] In

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The Judicial Arbitration and Mediation Service (JAMS) only "encourages the use of mediation and of voluntary arbitration that is not a condition of initial or continued employment," and "does not encourage the use of" "condition-of-employment clauses." JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness (2005).

[21] *E.g., Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 2000 (9th Cir. 2002).

[22] *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 745 (9th Cir. 2003) (en banc) (employee dismissed on his first day of work when he refused to sign the required arbitration agreement); *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1310-11 (11th Cir. 2002) (five employees dismissed for refusing to sign required arbitration agreement); *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 981 (7th Cir. 2001) (four employees dismissed for refusing to sign required arbitration agreement).

One judge correctly observed regarding agreements coerced by such threats:

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other instances, employers have issued documents to their workers asserting that those employees, merely by remaining on the job, will be deemed to have agreed to mandatory arbitration; if those documents are legally operative, the employees must quit or they will forfeit their rights to seek redress in court.[23]

Whether employee waivers and agreements must be knowing and voluntary was the critical threshold question in the litigation below, and is of controlling importance to the outcome of this case. Gulfstream argued, and the courts below agreed, that the plaintiffs waived their right to seek judicial relief when they continued to work after receiving envelopes with copies of the DRP. But the courts did not hold, and Gulfstream never argued, that the plaintiffs actually *knew* that they were forfeiting that right, or entering into a contract, merely by continuing to work. Gulfstream candidly acknowledged that its intent was to require employees to choose between forfeiting their jobs or forfeiting their right to judicial relief.[24] "A waiver secured under threat of substantial economic sanction cannot be termed *voluntary*." *Lefkowitz v. Turley*, 414 U.S. 70, 82-83 (1973) (emphasis added).

> [T]here was nothing voluntary about the arbitration agreement at issue here. LeLouis was told to sign the agreement or else she would be fired.

LeLouis v. Western Directory Co., 230 F. Supp. 2d 1214, 1219 (D.Or. 2001).

[23] *E.g., May v. Higbee Co.*, 372 F.3d 757, 759 (5th Cir. 2004); *Tinder v. Pinkerton Security*, 305 F.3d 728, 731-32 (7th Cir. 2002).

[24] Brief for Defendants-Appellees, pp. 51-52 ("While Gulfstream required the DRP as a condition of employment, Appellants were always free to find other employment."); Defendants' Motion and Memorandum to Compel Arbitration and Dismiss Action, p. 14 ("Employees could accept the terms and conditions of the DRP and return to work following receipt of the DRP, or they could reject the DRP and quit.").

The Seventh Circuit has correctly recognized that efforts by employers to make their employees agree to compulsory arbitration raise

> an important issue: whether the prerogative of litigating one's Title VII and ADA claims in federal courts is the type of important right the relinquishment of which requires a knowing and voluntary waiver. The Supreme Court indicated in *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 51-52 n.15 (1974), that an employee could not forfeit substantive rights under Title VII absent a voluntary and knowing waiver. Less clear is whether the right to have one's federal claims determined judicially rather than in an arbitration proceeding qualifies for this added protection.

Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1129 (7th Cir. 1997).

A. The Conflict Regarding the Federal Standard

The Eleventh Circuit itself recognized the inter-circuit split regarding whether such a waiver must be knowing and voluntary. The court of appeals in the instant case held that waivers of such procedural rights – including the Seventh Amendment right to a jury trial – need not be knowing and voluntary. "We . . . conclude that . . . no heightened 'knowing and voluntary' standard applies, even where the covered claims include federal statutory claims generally involving a jury trial right." (App. 19-20). But in doing so it expressly recognized that both the Sixth and Ninth Circuits had reached the contrary conclusion.[25] The Eleventh Circuit also

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[25] App. 21 n.14:

But see Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 381 (6th Cir. 2005) (holding arbitration agreement waiver of jury right to "knowing and voluntary" standard);

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noted that the First Circuit had adopted a related requirement that any arbitration agreement involving federal employment (or, at the least, Title VII) claims, must be "appropriate." (App. 26-27 n.18, *quoting Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 19 (1st Cir. 1999)). The court below rejected that First Circuit standard as well, explaining that "[t]his Circuit has not adopted the *Rosenberg* 'appropriate' requirement, and we decline to do so in this case." (App. 26-27 n.18.)

Other courts have also recognized this conflict. The Ninth Circuit in 1994 adopted a requirement that any waiver had to be "knowing." *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994). The Third Circuit, like the Eleventh, has expressly rejected the Ninth Circuit standard. "We respectfully disagree with the decision of the court in *Lai*." *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 184 (3d Cir. 1998). The First Circuit has recognized that

> [o]n this issue of whether there is a heightened level of protection, the circuits are split. The Supreme Court has not directly decided the issue. The Ninth Circuit has expressly adopted a "knowing" standard for such arbitration clauses and has described the standard as being a heightened one. . . . The Third Circuit has rejected any heightened standard.

Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 18 (1st Cir. 1999). In *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1129 (7th Cir. 1997), the Seventh Circuit noted that the rule in the Ninth

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Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994) (concluding that "a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration.").

Circuit conflicted with the standard in the Eighth Circuit. In *Haskins v. Prudential Insurance Co.*, 230 F.3d 231, 235 (6th Cir. 2000), the court of appeals noted that "several courts have adjudicated matters involving facts almost identical to those presented here [and] have done so in three different ways."[26]

The Sixth Circuit has recently emphatically reaffirmed its application of the knowing and voluntary standard to employer-imposed compulsory arbitration agreements. *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 381 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 730 (2005). *Walker* applied longstanding Sixth Circuit precedent endorsing that standard, dating from that circuit's decisions in *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985), and *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir. 2003) (en banc).

> [T]o evaluate whether a plaintiff has knowingly and voluntarily waived his or her right to pursue employment claims in federal court, the following factors must be evaluated: (1) plaintiff's experience, background, and education; (2) the amount of time the plaintiff had to consider whether to sign the waiver, including whether the employee had an opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) consideration for the waiver; as well as (5) the totality of the circumstances.

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[26] An Illinois appellate court noted the ongoing confusion among the federal courts of appeals:

> [T]he Ninth Circuit's knowing waiver analysis . . . has not garnered universal support. Although the First and Seventh Circuit have endorsed the Ninth Circuit's approach without adopting it . . . , the Third and Eighth Circuit Courts of Appeals have both expressly rejected it.

Melena v. Anheuser-Busch, Inc., 352 Ill. App. 3d 699, 705, 816 N.E. 2d 826, 831, 287 Ill. Dec. 859, 864 (App. Ct. 2004).

400 F.3d at 381. In the instant case the Eleventh Circuit expressly noted and rejected the Sixth Circuit standard in *Walker*. (App. 21 at n.14).

In *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255 (2d Cir. 1977), the Second Circuit held that any waiver of the Seventh Amendment right to jury trial must be knowing and intentional.[27] In that case there was a jury trial waiver "buried in the eleventh paragraph of a fine print, sixteen clause [lease] agreement." 565 F.2d at 258. The Second Circuit held that such a provision was insufficient to establish that the tenant had knowingly and intentionally given up his right to jury trial.

> It is elementary that the Seventh Amendment right to a jury is fundamental and that its protection can only be relinquished knowingly and intentionally. . . . Indeed, a presumption exists against its waiver. . . . There is little doubt that the provision relied on by NER fails to overcome this presumption. The waiver clause was set deeply and inconspicuously in the contract. . . . "[T]his printed form provision buried in a multitude of words is too weak an imitation of a genuine agreement to be treated as a waiver of so important a constitutional safeguard . . . [I]t exhausts credulity to think that . . . any . . . layman reading these legalistic words would have known or even suspected that they amounted to (such) an agreement." . . . Moreover, it is clear that Hendrix did not have any choice but to accept the NER contract as written if he was to get badly needed funds. This gross inequality in bargaining power suggests too, that

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[27] The Second Circuit reiterated that requirement in *Wright v. Lane*, 76 F.3d 57, 60 (2d Cir. 1996), *Tray-Wrap, Inc. v. Six L's Packaging Co., Inc.*, 984 F.2d 65, 68 (2d Cir. 1993), and *Heyman v. Kline*, 456 F.2d 123, 129 (2d Cir. 1972).

> the asserted waiver was neither knowing nor intentional.

565 F.2d at 258. *See Seaboard Lumber Co. v. U.S.*, 903 F.2d 1560, 1563 (Fed. Cir. 1990) ("Waiver [of the Seventh Amendment right to trial by jury] requires . . . that the party waiving such right do so 'voluntarily' and 'knowingly' based on the facts of the case."); *Hulsey v. West*, 966 F.2d 579, 581 (10th Cir. 1992) (at the least jury trial waiver not valid if party against whom it is asserted shows that "its consent to the provisions was not knowing and voluntary") (*quoting K.M.C. Corp. v. Irving Trust Co.*, 757 F.2d 752, 758 (6th Cir. 1985)).

In the instant case, on the other hand, the Eleventh Circuit expressly held that a waiver of the Seventh Amendment jury trial right and other federal procedural rights did not have to be either knowing or voluntary. (App. 17). The Third Circuit has also rejected the knowing and voluntary standard, holding that a party objecting to the loss of procedural rights involved in an arbitration agreement must instead demonstrate fraud or mistake. *Seus v. John Nuveen & Co.*, 146 F.3d at 183. The Fifth Circuit as well has refused to apply the knowing and voluntary standard, insisting that "there is no requirement that an arbitration provision must clearly and unmistakably express the waiver of an individual's rights" "to a judicial forum" and "to a jury trial." *American Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002). Similarly, the Fourth Circuit insists that it is irrelevant whether an individual was in fact unaware of an arbitration clause or purported jury trial waiver; a party seeking to avoid mandatory arbitration must demonstrate "fraud or overreaching." *Sydnor v. Conesco Financial Servicing Corp.*, 252 F.3d 302, 306 (4th Cir. 2001).

The First Circuit at this point adheres to an intermediate position. In *Ramirez-De-Arellano v. American Airlines, Inc.*, 133 F.3d 89, 90 (1st Cir. 1997), the court insisted with

regard to an action under the Fair Labor Standards Act that "the threshold question for review must always be whether the agreement to arbitrate was, indeed, voluntary and intentional." *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1059 (1st Cir. 1998), held that a document purporting to waive the right to jury trial must contain "clear language" whose meaning would be understood by "a worker presumably not trained to decipher legalese." Then, in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999), the First Circuit declined to resolve the "general issue" of whether any agreement to arbitrate Title VII claims must be "knowing and voluntary." 170 F.3d at 18. But at the least, *Rosenberg* held, enforcement of an asserted arbitration agreement must be "appropriate," a term derived from a provision of the 1991 Civil Rights Act. 105 Stat. 1081. Enforcement would not be "appropriate" if the agreement resulted from "overwhelming economic power." 170 F.3d at 19 (*quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)). And under this "appropriateness" standard "the risk of ambiguity is on the drafting party." 170 F.3d at 19 n.16. This First Circuit standard is similar to, but somewhat less demanding, than the "clear and unmistakable" standard of *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 79 (1998).

The Ninth Circuit today utilizes a hybrid federal-state standard. Federal law, the Ninth Circuit insists, demands that an arbitration agreement, including its waiver of the right to a jury trial, be *knowing*.

> Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes. . . . [W]e conclude that a Title VII plaintiff may only be forced to

> forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such claims to arbitration.

Prudential Ins. Co. v. Lai, 42 F.3d at 1304-05.[28] The Ninth Circuit has repeatedly refused to compel arbitration where it concluded that the individual in question had not knowingly entered into an arbitration agreement. *Kummetz v. Tech Mold Inc.*, 152 F.3d 1153 (9th Cir. 1998) (Americans With Disabilities Act); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997) (Americans With Disabilities Act).

At one time the Ninth Circuit held that under federal law an individual's agreement to arbitrate claims under federal employment laws must also be *voluntary*. "Under the Civil Rights Act of 1991 employees may not be required, as a condition of employment, to waive their right to bring future Title VII claims in court." *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1190 (9th Cir. 1998). Three years ago the Ninth Circuit overruled *Duffield*'s interpretation of federal civil rights laws. *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc). In the Ninth Circuit today the question of whether an arbitration agreement must be voluntary turns instead on the applicable *state* law. The Ninth Circuit has repeatedly held, both before and after *Luce, Forward*, that it is "procedurally unconscionable" (or "procedurally oppressive") under California law for an employer to require an individual to agree to arbitration as a condition of obtaining or keeping employment.[29] Under

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[28] The Ninth Circuit relied in part on a statement of Senator Dole, explaining that section 118 of the 1991 Civil Rights Act provision encourages arbitration only "where the parties knowingly and voluntarily elect to use those methods." 42 F.3d at 1305.

[29] *Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060, 1064 (9th Cir. 2005) (reiterating that the prior decision in *Mantor* and the 2003

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decision in *Ingle* are good law despite the intervening decision in *Luce Forward*); *Siordia v. Circuit City Stores, Inc.*, 2005 WL 1368083 *1 (9th Cir. 2005) (holding that *Luce Forward* does not alter the rule that arbitration agreements "that are a prerequisite or condition of employment" are procedurally unconscionable); *Ingle v. Circuit City Stores, Inc.*, 408 F.3d 592, 595 (9th Cir. 2005) ("*Luce Forward* did not limit or overrule *Ingle I*; nor did *Luce Forward* even address or cite *Ingle I*. *Ingle I* held that, as a matter of California contract law, Circuit City's compulsory arbitration agreement was unconscionable and hence, unenforceable. *Ingle*, 328 F.3d at 1180. *Luce Forward* did not examine California contract law at all. *Luce Forward* was a narrowly written decision overruling *Duffield* and holding that the Civil Rights Act of 1991 does not preclude an employer from requiring an employee to arbitrate Title VII claims as a condition of employment."); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir. 2003) ("Circuit City's arbitration agreement . . . requires, as a condition of employment, that employees waive their right to bring future claim in court. . . . Ingle had no meaningful opportunity to opt out of the arbitration agreement, nor did she have any power to negotiate the terms of the agreement. Therefore because Circuit City presented the arbitration agreement to Ingle on an adhere-or-reject basis, we conclude that the agreement is procedurally unconscionable"); *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1106 (9th Cir. 2003) ("Mantor . . . was given an 'opt-out' form by which he could elect not to participate in the arbitration program. But Circuit City management . . . resorted to threatening his job outright should Mantor exercise his putative 'right' to opt out. The fact that Circuit City management pressured and even threatened Mantor into assenting to the arbitration agreement demonstrates that he had no *meaningful* opportunity to opt out of the program. When a party to a contract possesses far greater bargaining power than another party, or when the stronger party pressures, harasses, or compels another party into entering into a contract, 'oppression and, therefore, procedural unconscionability, are present.' See *Ingle*") (emphasis in original, footnote omitted); *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 783-84 (9th Cir. 2002) ("[T]he arbitration agreement was imposed as a condition of employment and was non-negotiable. . . . California courts have consistently held that where a party in a position of unequal bargaining power is presented with an offending clause without the opportunity for meaningful negotiation, oppression and, therefore, procedural unconscionability, are present."); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002) ("The [arbitration provision] is procedurally unconscionable because it is a contract of adhesion; a standard-form contract, drafted by

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California law such a procedurally unconscionable arbitration agreement is invalid if it includes a provision which is also "substantively unconscionable" under state law. The Ninth Circuit has identified several arbitration provisions which are substantively unconscionable as a matter of law in California, including a ban on class actions in arbitration[30] and a unilateral power of the employer to modify the agreement,[31] two of the very provisions involved in the instant case. Thus if the instant claim had arisen in California federal court, the Ninth Circuit would have refused to enforce the asserted arbitration agreement.

The District of Columbia Circuit also holds that a waiver of the right to seek judicial enforcement of federal civil rights laws must be knowing. In *Bailey v. Federal*

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the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely . . . [F]ew applicants are in a position to refuse a job because of an arbitration agreement."); *see Armendariz v. Foundation Health Psychare Services, Inc.*, 24 Cal. 4th 83, 115, 99 Cal. Rptr. 745, 768 (2000) ("[The arbitration agreement] was imposed on employees as a condition of employment and there was no opportunity to negotiate. . . . [T]he arbitration agreement stands between the employee and necessary employment. . . . Arbitration is favored in this state as a *voluntary* means of resolving disputes, and this *voluntariness* has been its bedrock justification.") (emphasis added).

[30] *Siordia v. Circuit City Stores, Inc.*, 2005 WL 1368083 *1 (9th Cir 2005); *Circuit City Stores, Inc. v. Mantor*, 335 F.3d at 1106; *Ingle v. Circuit City Stores, Inc.*, 328 F.3d at 1175-76.

Within the last year the California Supreme Court held that arbitration provisions precluding class proceedings generally are substantively unconscionable. *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 30 Cal. Rptr. 76 (2005). The California Supreme Court rejected arguments that state unconscionability law is preempted by the FAA. 36 Cal. 4th at 164-73, 30 Cal. Rptr. at 88-96.

[31] *Siordia v. Circuit City Stores, Inc.*, 2005 WL 1368083 *1 (9th Cir 2005); *Circuit City Stores, Inc. v. Mantor*, 335 F.3d at 1106; *Ingle*, 328 F.3d at 1179.

National Mortgage Association, 209 F.3d 740 (D.C. Cir. 2000), the employer had issued to its workers a document indicating that agreement to binding arbitration was a "condition of employment." 209 F.3d at 742. The employer argued (as in the instant case) that when the plaintiff

> *continued* in his job with the employer, this showed that he acceded [to] the Dispute Resolution Policy, because the Policy itself was proclaimed to be a "condition of employment."

209 F.3d at 746 (emphasis in original). The District of Columbia Circuit held that there was no enforceable waiver of the right to seek judicial belief because the plaintiff's actions did not constitute a "knowing agreement," citing the Ninth Circuit decision in *Nelson*. 209 F.3d at 746-47.

This multi-faceted division among the lower courts arises in part because of the conflicting implications of the decisions of this Court. The district court below, for example, believed that imposition of a knowing and voluntary standard "flies in the face of" the holding in *Gilmer v. Interstate/Johnson Law Corp.*, 500 U.S. 20, 26 (1991), that arbitration agreements do not forgo substantive rights, but only alter the forum in which those rights are to be resolved. (App. 43 n.6). The Sixth Circuit, on the other hand, relied on the admonition in *Fuentes v. Shevin*, 407 U.S. 67, 70 (1972), that "a waiver of constitutional right in any context must, at the very *least*, be clear." *K.M.C., Inc. v. Irving Trust Co.*, 757 F.2d 752, 757 n.3 (6th Cir. 1985) (emphasis in original). The Ninth Circuit in *Prudential Ins. Co. v. Lai*, 42 F.3d at 1305, relied heavily on this Court's decision in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974). And the District of Columbia Circuit in *Bailey v. Federal National Mortgage Association*, 209 F.3d at 747, insisted that the requirement that any waiver be knowing is supported by this Court's decision in *Wright v. Universal Maritime Service Corp.*, 525 U.S.

70 (1998). The Fifth Circuit, on the other hand, maintains that the decision in *Wright* is of no relevance to the validity of an individual arbitration agreement. *American Heritage Life Ins. Co. v. Orr*, 294 F.3d at 711.

B. The Conflict Regarding Whether The States May Impose A "Knowing and Voluntary" Standard

The lower courts are also divided as to whether the Federal Arbitration Act permits *state law* to impose a requirement that arbitration agreements be knowing and/or voluntary. In the instant case, petitioners argued that Georgia law precluded employers from requiring workers to agree to arbitration provisions that waived their right to jury trial. Although the Eleventh Circuit doubted that Georgia law so provided, the court of appeals insisted that state law was irrelevant. "In any event, the F[ederal Arbitration Act] and federal law controls the waiver issue." (App. 21 n.15). In *Seus* the Third Circuit insisted that "a heightened knowing and voluntary standard . . . would be inconsistent with the FAA and *Gilmer* [*v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)]." 146 F.3d at 179.

The highest courts of eight states have adopted with regard to waivers of procedural rights the very types of limitations which the Third and Eleventh Circuits insist are barred by the FAA.

The Supreme Court of New Jersey has imposed on arbitration agreements precisely the knowing and voluntariness requirement which the Third and Eleventh Circuit hold is inconsistent with the FAA. In *Garfinkel v. Morristown Obstetrics & Gynecology Associates, P.A.*, 168 N.J. 124, 136, 778 A.2d 665, 673 (2001), that court held that the circumstances of an arbitration agreement must "ensur[e] that a

waiver of statutory remedies is indeed knowing and voluntary." *See Leodori v. Cigna Corp.*, 175 N.J. 293, 301, 814 A.2d 1098, 1103-04 (2003) (arbitration agreement must be "knowing and voluntary"). In *Leodori*, as in the instant case, the employer sought to limit its workers to arbitration by sending them documents announcing that merely by remaining on the job those employees would be agreeing to binding arbitration. The New Jersey Supreme Court held that a worker's decision to remain in the employ of Cigna still was insufficient to create a binding agreement, because an employee's failure to resign did not demonstrate "that an employee has agreed clearly and unambiguously to arbitrat[ion]." 175 N.J. at 302.

> [A] valid waiver results only from an explicit, affirmative agreement that unmistakably reflects the employee's assent. . . . Defendant argues that plaintiff's receipt of the handbook and his continued employment at the company constituted an implied but enforceable agreement to abide by the arbitration policy. . . . [A]n arbitration provision cannot be enforced against an employee who does not sign or otherwise explicitly indicate his or her agreement to it.

175 N.J. at 303-06, 814 A.2d at 1105-06. The New Jersey court expressly rejected the employer's objection that this requirement "would run afoul of the FAA." 175 N.J. at 306, 814 A.2d at 1106.

The Supreme Court of Montana holds that an arbitration agreement, because it waives an individual's rights under the Montana Constitution to a trial by jury and to access to the state's courts, must be knowing and voluntary.

> [W]here fundamental constitutional rights are involved – here, the right of trial by jury and, in my opinion, access to the courts – the law is eminently clear that the waiver of such rights will

> not be lightly presumed. . . . A waiver of a fundamental right must be proved to have been made voluntarily, knowingly, and intelligently – typically by the party seeking the waiver.

Koss v. Edward D. Jones & Co., 310 Mont. 123, 143, 54 P.3d 1, 14, 15 (2002) (opinion for the court by Nelson, J.).[32] The court insisted that this rule did not conflict with the FAA. 310 Mont. at 145, 54 P.2d at 15-16. The Utah Supreme Court holds that because an arbitration agreement would waive the right under the Utah Constitution to access to the courts, "any such waiver must be voluntary, intelligent, and knowing." *Penkins v. Percival*, 962 P.2d 796, 799 (Utah 1998). The Missouri Supreme Court holds that any waiver of the state constitutional right to a jury trial must be knowing and voluntary. *Malan Realty Investors, Inc. v. Harris*, 953 S.W. 2d 624, 627-28 (Mo. 1997).

Three states apply to contracts, including arbitration agreements, a standard of unconscionability in which voluntariness is a key element. In California, such an agreement is invalid if it is both procedurally unconscionable and substantively unconscionable. *Armendariz v. Foundation Health Psychare Services, Inc.*, 24 Cal. 4th 83 (2000). An agreement is procedurally unconscionable if it was "imposed on employees as a condition of employment and there was no opportunity to negotiate." 24 Cal. 4th at 115. Such an agreement is substantively unconscionable if, for example (as here), it bars class claims in arbitration. *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005). The California Supreme Court holds that the imposition of such requirements is entirely consistent with the FAA. *Armendariz*, 24 Cal. 4th at 97-99.

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[32] This opinion was joined by four members of the five-member panel of the Montana Supreme Court which decided the case.

The West Virginia Supreme Court applies to arbitration agreements a similar two-part unconscionability standard. *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E. 2d 265 (2002). First, the agreement must be a contract of adhesion, the terms of which were dictated by one party and were non-negotiable. 211 W.Va. at 557-560. Second, the agreement must contain one or more provisions that are substantively unconscionable; the prohibition of class actions in arbitration is substantively unconscionable under West Virginia law. 211 W.Va. 562-63. The West Virginia court too has concluded that this state limitation is permissible under the FAA. 211 W.Va. at 563-64.

The Washington Supreme Court holds that an agreement (including an arbitration agreement) is procedurally unconscionable if it is offered on a take-it-or-leave-it basis and a worker is threatened with dismissal if he or she refuses to sign. *Adler v. Fred Lind Manor*, 153 Wash. 2d 331, 347-49, 103 P.2d 773, 782-83 (2005). A finding of procedural unconscionability

> will necessarily lead to a finding that . . . [the] waiver was not "knowing, voluntary and intelligent." If such a finding is ultimately made, the arbitration agreement would be void.

153 Wash. 2d at 351 n.9, 103 P.2d at 784 n.9.

The Connecticut Supreme Court holds that a waiver of the state right to a jury trial would be valid only if "there is clear evidence of an intent to waive." *L & R Realty v. Connecticut National Bank*, 246 Conn. 1, 715 A.2d 748 (1998). The factors which Connecticut courts consider in applying this standard include both elements

related to voluntariness[33] and elements related to whether a waiver was knowing.[34]

The impact of these state decisions on federal employment claims varies with the rationale of the various decisions. The unconscionability standards in California, Washington and West Virginia would apply to federal employment claims in either federal or state court. The holdings in Montana and Utah, which rest on access to the state courts, would apply to any lawsuit in state court seeking to enforce federal employment law, but would not apply to claims in federal court. The decisions in Connecticut and Missouri, because they are based on the state right to jury trial, would apply to federal employment claims only in state court and would be limited to claims for which the relevant state constitutional provision guaranteed a right to jury trial.

C. The Conflict Regarding Which Party Bears The Burden of Proof Regarding Whether A Waiver Was Knowing and Voluntary

Among the courts of appeals which do require that a waiver of the right to jury trial must be knowing and/or voluntary, there is a further conflict regarding which party

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[33] 246 Conn. at 15, 715 A.2d at 755:

> whether there was a substantial disparity in bargaining power between the parties to the agreement . . . whether the opposing party had an opportunity to negotiate the terms of the agreement.

[34] 246 Conn. at 15, 715 A.2d at 755:

> the conspicuousness of the waiver clause, including (a) its location relative to the signatures of the parties, (b) whether it was buried in the middle of a length agreement, and (c) whether it was printed in a different typeface or font size than the remainder of the contract.

bears the burden of proof on that issue. The Sixth Circuit holds that the party challenging the validity of the waiver bears the burden of proof. *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752, 758 (6th Cir. 1985). The Second Circuit holds, to the contrary, that the party seeking to enforce the waiver bears that burden. *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977).

This inter-circuit conflict is widely recognized. *See Medical Air Technology Corp. v. Marwan Inv., Inc.*, 303 F.3d 11, 18 n.3 (1st Cir. 2002) ("The circuits are currently split on the question of which party bears the burden of proof as to whether a contractual jury trial waiver was knowing and voluntary."); *Pierce v. Atchison, Topeka and Santa Fe R.R.*, 110 F.3d 431, 435 n.4 (7th Cir. 1997) ("The circuits are split on whether the party asserting the validity of such a waiver [of the right to jury trial] bears the burden of proof as to whether the waiver was knowingly and voluntarily executed."); *Hulsey v. West*, 966 F.2d 579, 581 (10th Cir. 1992) ("The circuits are split on this issue when considering an express provision in a contract."); *Household Commercial Financial Services, Inc. v. Suddarth*, 2002 WL 31017608 *8 (N.D.Ill. 2002) ("the circuits are split on whether the party asserting the validity of a contractual jury waiver bears the burden of proof as to whether the waiver was knowingly and voluntarily executed."); *Luis Acosta, Inc. v. Citibank, N.A.*, 920 F. Supp. 2d 15, 18 (D.P.R. 1996) ("There is a split among the circuits as to which party bears the burden of proof, either that the waiver was knowingly and voluntarily consented to, or that it was not."); *Cooperative Finance Ass'n, Inc. v. Garst*, 871 F. Supp. 1168, 1171-72 (N.D.Iowa 1995) ("There is a split in the circuits as to which party, the one asserting waiver, or the one denying it, bears the burden of showing that a contractual waiver was or was not knowing and voluntary."); *Hydramar, Inc. v. General Dynamics Corp.*,

1989 WL 159267 *2 (E.D.Pa. 1989) (noting conflict among the courts of appeals).

II. THE QUESTION PRESENTED IS OF SUBSTANTIAL NATIONAL IMPORTANCE

The issue presented by this case is of over-arching importance in light of the increasing use by employers of various forms of company-imposed arbitration provisions.

Today the validity of such waivers varies decisively from circuit to circuit. The supposed waiver created by the DRP in this case would, for example, be invalid in the Sixth Circuit or in the Ninth Circuit, most emphatically so if this action had been brought in federal district court in California. That circumstance alone strongly supports a grant of certiorari.

Inter-circuit conflicts are even more serious regarding employer-imposed arbitration because many of the employers seeking to impose such arrangements are national companies. Gulfstream, for example, has plants in Georgia, California, Texas, and Wisconsin. General Dynamics, Gulfstream's parent company which uses some form of the DRP widely, has plants in dozens of states and many circuits. Thus an inter-circuit conflict requires a national firm to make different disclosures and use different methods of obtaining waivers depending on the location of each plant or office.

Where an employer has offices or plants in several circuits, a plaintiff often could pick the circuit with the most favorable law on this issue.[35] That tactic would be particularly likely to succeed where the complaint challenged a practice that existed in multiple plants and

[35] There would be venue in each of those circuits for an action by an aggrieved employee. 28 U.S.C. § 1391(a)-(c).

offices. If, for example, an employee wished to challenge a company-wide Gulfstream practice, he or she could bring a class action in federal district court in California, which under Ninth Circuit precedent would not recognize the validity of the DRP as a waiver of the right to sue.

A similar problem arises from the differences between federal and state standards on this matter. For example, the DRP, and the manner in which it was obtained, might be valid under the Third Circuit precedent in *Seus*, but the DRP would be held invalid under *Leodori* in an action in state court in New Jersey. A similar problem exists in the Fourth Circuit, where that Circuit's precedent in *Sydnor* conflicts with the standard applied by the West Virginia Supreme Court in *Dunlap*. A plaintiff could avoid the standards in *Seus* and *Sydnor* by filing in state court. If a claim arising in New Jersey or West Virginia were filed in or removed to federal court, there would be serious problems under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Federal district courts in New Jersey apply the New Jersey state standard in *Leodori*,[36] but federal district courts in West Virginia have rejected the state standard in *Dunlap* in favor of the Fourth Circuit standard in *Sydnor*.[37]

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[36] *Gilbert v. Fox & Roach*, 2005 WL 2347121 at *3 (D.N.J. 2005); *Sarbak v. Citigroup Global Markets, Inc.*, 354 F. Supp. 2d 531, 537-38 (D.N.J. 2004).

[37] *Schultz v. AT&T Wireless Services, Inc.*, 376 F. Supp. 2d 685, 689-91 (N.D.W.Va. 2005); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603, 612 (S.D.W.Va. 2004).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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428 F.3d 1359

United States Court of Appeals,
Eleventh Circuit.

Lee CALEY, William Etzel, Stanley Walker, and all persons similarly situated, Plaintiffs-Appellants,

v.

GULFSTREAM AEROSPACE CORPORATION, General Dynamics Corporation, Defendants-Appellees.

Dianne Jackson, Marlon Greene, Robert Vouk, Willie Mae Stewart, and all persons similarly situated, Plaintiffs-Appellants,

v.

Gulfstream Aerospace Corporation, General Dynamics Corporation, Defendants-Appellees.

Nos. 04-14462, 04-14463.

Oct. 31, 2005.

Harlan S. Miller, III, Miller, Billips & Ates, P.C., Atlanta, GA, for Appellants.

Wade W. Herring, II, Shawn A. Kachmar, Hunter, Maclean, Exley, Dunn, P.C., Savannah, GA, James H. Cox, III, Atlanta, GA, for Appellees.

Ann Elizabeth Reesman, McGuiness, Norris & Williams, LLP, Stephen A. Bokat, Nat. Chamber Lit. Ctr., Inc., Washington, DC, for Amici Curiae.

Appeals from the United States District Court for the Northern District of Georgia.

Before BIRCH, HULL and BOWMAN*, Circuit Judges.

HULL, Circuit Judge:

The plaintiffs-appellants ("plaintiffs") in this case are employees and former employees of defendant Gulfstream Aerospace Corporation ("Gulfstream"), which adopted a dispute resolution policy (the "DRP") during the plaintiffs' employment. The plaintiffs subsequently filed two law suits against Gulfstream alleging various discrimination and other claims under the Age Discrimination in Employment Act ("ADEA"), the Fair Labor Standards Act ("FLSA"), the Employee Retirement Income Security Act ("ERISA"), and Title VII. The district court granted the defendants' motions to compel arbitration of the plaintiffs' claims and to dismiss pursuant to the DRP. On appeal, the plaintiffs argue that Gulfstream's DRP is unenforceable. After review and oral argument, we affirm.

I. BACKGROUND

A. *Dispute Resolution Policy*

Each of the plaintiffs is a current or former employee of Gulfstream and was employed at Gulfstream's Savannah, Georgia, facility during the relevant period from the summer of 2002 until the spring of 2003. During the summer of 2002, Gulfstream adopted the DRP to serve as its exclusive method for resolving covered employment-related disputes between itself and its employees.

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* Honorable Pasco M. Bowman, II, United States Circuit Judge for the Eighth Circuit, sitting by designation.

On or about July 15, 2002, Gulfstream mailed to all of the workers employed at its Savannah facility a copy of the DRP, an explanatory cover letter, and a question-and-answer form. An outside company mailed the documents by first-class mail to the employee addresses on file with Gulfstream's human resources department.[1] In addition, Gulfstream placed the DRP and accompanying documents on the company intranet accessible by the plaintiffs. Gulfstream also distributed the DRP electronically through the Management Newsletter emailed to approximately 1,000 employees. Gulfstream also posted notices relating to the DRP's implementation, but not the DRP itself, on thirteen bulletin boards throughout the Savannah facility.

The explanatory cover letter, mailed with the DRP on July 15, 2002, read in part as follows: "The DRP will become the exclusive procedure to resolve covered workplace disputes – so you should carefully read the enclosed brochure. This policy, which will become effective on August 1, 2002, will be a *condition of continued employment*. All covered claims will be subject to this DRP at that time." (Emphasis added.)

In addition, the DRP itself included the following clause explaining that the DPP was a contract and that an

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[1] The district court found that each of the plaintiffs had sufficient notice of the DRP. On appeal, the plaintiffs note that no return-receipt was required and suggest that Gulfstream tried to minimize attention to the DRP. However, they do not challenge the district court's conclusion that each of the plaintiffs had sufficient notice of the DRP. Rather, as outlined later, they argue that the DRP is unenforceable for various other reasons.

employee's continuation of employment constituted acceptance:

> *Acceptance/No Change in Terms of Employment*
>
> The submission of an application, acceptance of employment or the continuation of employment by an individual shall be deemed to be acceptance of the DRP. No signature shall be required for the policy to be applicable. The mutual obligations set forth in this DRP shall constitute a contract between the Employee and the Company but shall not change an Employee's at-will relationship or any term of any other contract or agreement between the Company and Employee. This Policy shall constitute the entire agreement between the Employee and Company for the resolution of Covered Claims.

The DRP established a four-level dispute-resolution process, as follows: Level One: Human Resources Review; Level Two: Management Panel Review; Level Three: Mediation; Level Four: Arbitration. The DRP explained how each level would work and set forth specific discovery rules.

The DRP also contained a time-based waiver applicable to employees. Specifically, the DRP provided that an employee's failure to submit a covered claim to the next level within thirty days of the final determination at a given level would waive the employee's rights to pursue the covered claim. While an employee was required to proceed through each level sequentially, the DRP specified that Gulfstream "may elect to bypass one or more steps prior to arbitration for disputes with applicants for employment, with former employees, or if the Company is the

initiating party." In addition, no time-based waiver applied to Gulfstream under the DRP.

The DRP defined "covered claims" as "employment-related claims . . . of a legal right, obligation or entitlement regarding or arising from the employment relationship." The DRP further provided that Covered Claims include, but are not limited to, the following:

> 1. Claims relating to involuntary terminations, such as layoffs and discharges (including constructive discharges);
>
> 2. Employment discrimination and harassment claims, based on, for example, age, race, sex, religion, national origin, veteran status, citizenship, disability or other characteristic protected by law; Retaliation claims for legally protected activity, and/or for whistleblowing;
>
> 3. Claims relating to state or federal Family and Medical Leave Acts;
>
> 4. Claims relating to workplace accommodation due to physical or mental disabilities;
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> 5. Tort claims, intentional torts, negligence, defamation, invasion of privacy, infliction or [sic] emotional distress, etc.;
>
> 6. Claims of violation of public policy; and
>
> 7. Claims based on express or implied contracts.

The DRP specifically excluded the following claims from its provisions:

> *Excluded Claims*
>
> Claims excluded from the DRP are the following:

1. Claims for benefits under a Company benefit plan, including those covered by Retirement Income Security Act of 1974 (ERISA);

2. Claims for workers' compensation, violations of specific safety requirements or unemployment compensation benefits;

3. Claims involving patents or inventions;

4. Claims covered under the National Labor Relations Act;

5. Claims against the Company or a present or former Employee which do not have any relationship to the Employee's work or relationship to the Company;

6. Claims which are personal in nature and do not involve a claim of a legal right, obligation or entitlement.

The DRP further provided that for certain limited claims, either the employee or Gulfstream "may . . . apply to any court of competent jurisdiction and seek interim provisional, injunctive, or other equitable relief until the arbitration award is rendered or the Covered Claim is otherwise resolved."[2] None of the claims in this case falls within this provision.

The DRP explicitly provided that it was "the sole and exclusive forum and remedy for all Covered Claims." It further provided that the employee and Gulfstream waived any right to jury trial, as follows: "The Employee

[2] This provision applied only to "claims involving alleged breach of Employee's non-competition, non-solicitation, fiduciary, or confidentiality obligations, as well as claims involving trademarks, trade secrets, business know-how or intellectual property."

and Company agree and hereby waive any right to jury trial for any Covered Claim."

Finally, the DRP provided that Gulfstream retained the right to modify or terminate the DRP on thirty days' written notice and that the policy in effect at the time a claim was received would govern the process by which the claim was determined.

In March 2003, Gulfstream modified certain terms of the DRP and noticed and distributed it by the same methods as the original version. The terms of the modified DRP were substantially similar. However, the revised DRP provided that the employee agreed that no "Covered Claim" may be brought as a class or collective action under the DRP.[3] The revised DRP also stated that the employee's continued employment would constitute acceptance. The effective date of the modification was April 10, 2003, and each of the plaintiffs was employed when notice of the modification to the DRP was given and on the effective date.

B. Plaintiffs' Lawsuits

On November 17, 2003, the plaintiffs filed two related complaints seeking damages and equitable relief from defendants Gulfstream and its parent company, General Dynamics Corporation ("General Dynamics"). In *Caley, et al. v. Gulfstream Aerospace Corp. and General Dynamics Corp.*, the plaintiffs' complaint asserted claims on behalf of an estimated class of two hundred workers under the

[3] The revised DRP also added to the list of Covered Claims "Claims relating to wages, hours, overtime, or other wage payment issues."

FLSA, charging that the defendants deliberately mischaracterized the plaintiffs as exempt from overtime pay requirements and therefore failed to pay the plaintiffs for hours worked in excess of forty per week. The same counsel filed the complaint in *Jackson, et al. v. Gulfstream Aerospace Corp. and General Dynamics Corp.* on behalf of an estimated class of one hundred workers, charging the same defendants with ADEA and ERISA violations, asserting other Georgia-law contract claims, and alleging individual claims of race discrimination, a retaliation claim, and a gender discrimination claim under Title VII and an FLSA retaliation claim on behalf of certain plaintiffs.[4]

In response to the complaints, the defendants filed motions to compel arbitration and to dismiss both actions. On March 10, 2004, General Dynamics (later joined by Gulfstream) moved to treat the *Caley* and *Jackson* actions as related. The motion was granted on March 26, 2004.

On August 24, 2004, the district court entered an order granting the defendants' motions to compel arbitration and to dismiss.[5]

The plaintiffs now appeal. This appeal concerns the validity of Gulfstream's DRP, which includes a requirement to arbitrate certain types of employment-related

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[4] The named plaintiffs in the *Jackson* case were terminated on April 11, 2003.

[5] The district court denied as moot other pending motions, including the plaintiffs' motions to compel discovery, plaintiffs' motions for partial summary judgment, and defendants' motions to strike or stay the plaintiffs' motions for partial summary judgment.

claims, including those asserted by the plaintiffs in these cases.

II. DISCUSSION

A. *Federal Arbitration Act*

The validity of an arbitration agreement is generally governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (the "FAA"), which was enacted in 1925 to reverse the longstanding judicial hostility toward arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27, 105 S.Ct. 3346, 3354, 87 L.Ed.2d 444 (1985); *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1312 (11th Cir.2002). The FAA "embodies a 'liberal federal policy favoring arbitration agreements.'" *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1288 (11th Cir.2005) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983)). The purpose of the FAA was "to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation." *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir.1998) (quotation marks, brackets, and citation omitted).

The FAA generally provides for the enforceability of "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The United States Supreme Court has clarified that the FAA generally applies to contracts of employment except those involving "transportation workers." *Circuit City v. Adams*, 532 U.S. 105, 119, 121 S.Ct. 1302, 1311, 149 L.Ed.2d 234 (2001); *Hill*, 398 F.3d at 1289. Further, "courts have consistently found that claims arising under federal statutes may be the subject of

arbitration agreements and are enforceable under the FAA." *Weeks,* 291 F.3d at 1313; *see Circuit City,* 532 U.S. at 123, 121 S.Ct. at 1313; *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 26, 111 S.Ct. 1647, 1652, 114 L.Ed.2d 26 (1991); *Mitsubishi Motors,* 473 U.S. at 628, 105 S.Ct. at 3354; *Bender v. A.G. Edwards & Sons, Inc.,* 971 F.2d 698, 700 (11th Cir.1992). Indeed, compulsory arbitration agreements are now common in the workplace, and it is not an unlawful employment practice for an employer to require an employee to arbitrate, rather than litigate, rights under various federal statutes, including employment-discrimination statutes. *See Weeks,* 291 F.3d at 1313-14.

Furthermore, under the FAA, arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of the contract." 9 U.S.C. § 2. The FAA preempts state law to the extent it treats arbitration agreements differently than other contracts. *Circuit City,* 532 U.S. at 112, 121 S.Ct. at 1307 (stating that the FAA is "pre-emptive of state laws hostile to arbitration"). The purpose of the FAA is to give arbitration agreements the same force and effect as other contracts. However, state law generally governs whether an enforceable contract or agreement to arbitrate exists. *See Perry v. Thomas,* 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 2527 n. 9, 96 L.Ed.2d 426 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."). Thus, in determining whether a binding agreement arose between the parties, courts apply the contract law of the particular state that governs the formation of contracts. The "federal policy favoring arbitration, however, is taken

into consideration even in applying ordinary state law." *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 498 (6th Cir.2004) (quotation marks and citation omitted).

On appeal, the plaintiffs make numerous arguments that the arbitration provision in the DRP is not a binding agreement or is unenforceable under either the FAA, federal statutory and constitutional law, or Georgia law. We address each of those claims in turn.[6]

B. "Written Agreement" Requirement in the FAA

The plaintiffs first argue that the DRP is not an "agreement in writing" for purposes of FAA enforcement because it is not signed by both parties. We reject this argument because while the FAA requires that the arbitration agreement be in writing, it does not require that it be signed by the parties.

We begin with § 2 of the FAA, which provides that "[a] written provision" to arbitrate shall be enforceable, as follows:

> A *written provision in* any maritime transaction or *a contract* evidencing a transaction involving commerce *to settle by arbitration a controversy* thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal,

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[6] "We review *de novo* the district court's order to compel arbitration." *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 (11th Cir.) (citations omitted), *cert. dismissed*, ___ U.S. ___, 125 S.Ct. 2954, 162 L.Ed.2d 884 (2005).

> *shall be valid, irrevocable, and enforceable,* save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). Similarly, the FAA's enforcement sections require a court to stay a proceeding where the issue in the proceeding "is referable to arbitration under an *agreement in writing* for such arbitration," 9 U.S.C. § 3 (emphasis added),[7] and provide for a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a *written agreement* for arbitration" to petition a district court for an order directing that arbitration proceed, 9 U.S.C. § 4 (emphasis added).[8] The FAA thus uses the statutory language of "[a] written

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[7] Section 3 provides in full as follows:

> *Stay of proceedings where issue therein referable to arbitration*
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> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default with such arbitration.

9 U.S.C. § 3.

[8] Section 4 provides, in relevant part, as follows:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . .

9 U.S.C. § 4.

provision" in a contract, "agreement in writing," and "written agreement," which we collectively refer to as the "written agreement" requirement.[9]

We readily conclude that no signature is needed to satisfy the FAA's written agreement requirement. First, the plain language of § 2 requires that the arbitration provision be "written." It does not, however, require that the agreement to arbitrate be signed by either party; nor does any other provision of the FAA. As the Tenth Circuit has explained, "Decisions under the Federal Arbitration Act . . . have held it not necessary that there be a simple integrated writing or that a party sign the writing containing the arbitration clause. All that is required is that the arbitration provision be in writing." *Medical Dev. Corp. v. Indus. Molding Corp.*, 479 F.2d 345, 348 (10th Cir.1973) (citations omitted); *see also Durkin v. Cigna Property & Cas. Corp.*, 942 F.Supp. 481, 487 (D.Kan.1996) ("The contract need not be written; rather, for arbitration of future disputes, section 2 requires '[a] written provision' in 'a contract.'").

Second, the overwhelming weight of authority supports the view that no signature is required to meet the FAA's "written" requirement. *See, e.g., Med. Dev. Corp.*, 479 F.2d at 348; *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 250 (2d Cir.1991) (holding that Vermont statute requiring that arbitration agreement be signed was preempted by the FAA); *Genesco, Inc. v. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir.1987) (stating that

[9] The meaning of this statutory language in the FAA involves interpretation of a federal statute and thus is a question of federal law. We thus reject the plaintiffs' argument that Georgia law governs this issue.

"while the [FAA] requires a writing, it does not require that the writing be signed by the parties"); *Valero Ref., Inc. v. M/T Lauberhorn,* 813 F.2d 60, 62 (5th Cir.1987) ("It is established that a party may be bound by an agreement to arbitrate even in the absence of his signature."); *Linea Navira De Cabotaje, C.A. v. Mar Caribe De Navegacion, C.A.,* 169 F.Supp.2d 1341, 1346 (M.D.Fla.2001) ("While an agreement to arbitrate must be in writing, there is no requirement that the writing be signed."); *Todd Habermann Constr., Inc. v. Epstein,* 70 F.Supp.2d 1170, 1174-75 (D.Colo.1999) (same); *see also Tinder v. Pinkerton Sec.,* 305 F.3d 728 (7th Cir.2002) (enforcing arbitration agreement unilaterally promulgated by employer even though employee never signed it without discussing "written agreement" requirement); *May v. Higbee Co.,* 372 F.3d 757, 764 (5th Cir.2004) (same). Indeed, this Court has found no decision to the contrary.

Here, the DRP is indisputably in writing. Although the employees' acceptance was by continuing their employment and was not in writing, all material terms – including the manner of acceptance – were set forth in the written DRP. The DRP stated that it was a contract and constituted the entire agreement between the employee and Gulfstream as to covered claims.[10] Nothing in the FAA suggests that a "written provision" must be signed to be enforceable. Accordingly, we conclude that the DRP is a written agreement to arbitrate for purposes of the FAA.

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[10] Whether continued employment can constitute acceptance of a contractual offer, and thus whether the DRP is a binding contract, is a different contract issue to be decided under state law. As discussed in greater detail below, contracts generally can be accepted by performance under Georgia law and general contract principles.

C. Commerce Nexus

The plaintiffs next argue that the FAA does not apply because the underlying employment relationship does not affect commerce. This argument also lacks merit.

Enacted pursuant to the Commerce Clause, the FAA applies only to a contract "evidencing a transaction involving [interstate] commerce." 9 U.S.C. § 2; *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 874 (11th Cir.2005), *petition for cert. filed*, 74 USLW 3162 (Sept. 12, 2005) (No. 05-347). "The Supreme Court has interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce' – words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Jenkins*, 400 F.3d at 874. The Supreme Court also has clarified that "Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57, 123 S.Ct. 2037, 2040, 156 L.Ed.2d 46 (2003) (quotation marks, ellipsis, and citation omitted).

Because Gulfstream's overall employment practices affect commerce, the Commerce Clause requirement is satisfied. *See Weeks*, 291 F.3d at 1314 (noting that "the Supreme Court in *Circuit City* . . . held that the FAA was

applicable to all contracts of employment except those contracts involving transportation workers").[11]

Having concluded that the DRP satisfies the FAA's requirements of a written agreement to arbitrate and of a contract involving commerce, we now must determine if it is otherwise enforceable.

D. Waiver of Trial Rights

The plaintiffs alternatively argue that the DRP and their continued employment under the DRP are ineffective to waive their Seventh Amendment and statutory trial rights, such as access to the courts and the right to a jury trial. They argue that because the DRP states that the employee "waive[s] any right to a jury trial," that waiver in the DRP is subject to a heightened "knowing and voluntary" standard in evaluating the enforcement of their waiver under federal law.[12]

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[11] The plaintiffs also argue that the DRP is not an agreement to settle disputes "by arbitration" because it sets forth three steps prior to actual arbitration, and thus that it is not enforceable under the FAA. The plaintiffs cite no case suggesting that the DRP's four-step process makes it any less an agreement to arbitrate, and the plaintiffs' argument on this issue is not well taken. Nothing in the FAA prescribes a particular arbitration procedure or prohibits a requirement that various steps be taken before arbitration is required. *See, e.g., Cooper,* 367 F.3d at 497-508 (enforcing arbitration agreement that required internal review prior to submission of claims to arbitration). Rather, the FAA requires enforcement of a wide range of arbitration agreements and leaves to the parties the discretion to craft an appropriate arbitration procedure.

[12] More specifically, the plaintiffs argue that a "totality of the circumstances" analysis is required under federal law to determine if the waiver of trial rights in the circulated DRP is knowing and voluntary. *See, e.g., Bledsoe v. Palm Beach County,* 133 F.3d 816 (11th

(Continued on following page)

For numerous reasons, we reject plaintiffs' contention and conclude that the DRP's agreement to arbitrate and waiver of jury trial rights are governed by contract principles and are not subject to the heightened knowing and voluntary standard argued by plaintiffs. First, arbitration contracts covered by the FAA, including the DRP here, are "valid, irrevocable, and enforceable," save upon such grounds as exist at law and in equity *for revocation of contracts.* 9 U.S.C. § 2. As the Supreme Court has recognized, a court can decline to enforce an arbitration agreement under the FAA only if the plaintiffs can point to a generally applicable principle of *contract* law under which the agreement could be revoked. *See Mitsubishi Motors,* 473 U.S. at 627, 105 S.Ct. at 3354. Thus, arbitration agreements under the FAA are enforceable absent fraud, duress, or some other misconduct or wrongful act recognized by the law of contracts for revocation of a contract.

Second, as the Supreme Court has recognized, a party agreeing to arbitration does not waive any substantive statutory rights; rather, the party simply agrees to submit those rights to an arbitral forum. *See id.* at 628, 105 S.Ct.

Cir.1998); *Puentes v. UPS,* 86 F.3d 196 (11th Cir.1996); *Griffin v. Kraft General Foods,* 62 F.3d 368 (11th Cir.1995). The plaintiffs assert that the relevant circumstances would include: (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff considered the agreement before signing it; (3) the clarity of the agreement; (4) the plaintiff's opportunity to consult with an attorney; (5) the employer's encouragement or discouragement of consultation with an attorney; (6) the consideration given in exchange for the waiver when compared with the benefits to which the employee was already entitled; and (7) the relative bargaining power of the parties. *D.H. Overmyer Co. v. Frick,* 405 U.S. 174, 92 S.Ct. 775, 782-83, 31 L.Ed.2d 124 (1972); *Puentes,* 86 F.3d at 198. By "knowing" and "voluntary" under the totality of the circumstances, plaintiffs mean much more than a general understanding that a binding agreement or contract is being entered into.

at 3354 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."); *Circuit City*, 532 U.S. at 123, 121 S.Ct. at 1313 ("The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in *Gilmer*, . . . by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

Third, as the Fifth Circuit has noted, "[t]he Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case *once it is determined that the litigation should proceed before a court.* If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes." *American Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir.2002) (emphasis added); *see also Sydnor v. Conseco Fin. Serv. Corp.*, 252 F.3d 302, 307 (4th Cir.2001) ("[T]he right to a jury trial attaches in the context of judicial proceedings *after it is determined that litigation should proceed before a court.* Thus, the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." (quotation marks and citation omitted) (emphasis added)); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 368 (7th Cir.1999) ("[W]e are satisfied, as was the Court in *Gilmer*, that the arbitral forum adequately protects an employee's statutory rights, both substantively and procedurally."); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183-84 (3d Cir.1998) (holding

that applying a heightened knowing-and-voluntary standard to arbitration agreements would be inconsistent with the FAA and *Gilmer*), *abrogated on other grounds, Blair v. Scott Specialty Gases,* 283 F.3d 595 (3d Cir.2002). Thus, where a party enters into a valid agreement to arbitrate, the party is not entitled to a jury trial or to a judicial forum for covered disputes.

Further, as noted earlier, the FAA's plain language is clear that arbitration agreements are enforceable except for state-law grounds for ordinary revocation. 9 U.S.C. § 2. In keeping with this language, this Court has previously applied a standard contract analysis, rather than a heightened "knowing and voluntary" standard, in evaluating the enforceability of an arbitration agreement. Specifically, this Court has explained that "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Thus, unless Congress has clearly expressed an intention to preclude arbitration of the statutory claim, a party is bound by its agreement to arbitrate." *Davis v. S. Energy Homes, Inc.,* 305 F.3d 1268, 1273 (11th Cir.2002) (quotation marks and citations omitted); *see also Weeks,* 291 F.3d at 1313 (noting that "[c]ourts have consistently found that claims arising under federal statutes may be the subject of arbitration agreements and are enforceable under the FAA").

We thus conclude that general contract principles govern the enforceability of arbitration agreements and that no heightened "knowing and voluntary" standard applies, even where the covered claims include federal

statutory claims generally involving a jury trial right.[13] Our conclusion is consistent with the decisions of many of our sister circuits. *See American Heritage Life Ins.*, 294 F.3d at 711 (holding that parties' arbitration agreement, which stated that the right to a trial and to a jury were waived, validly waived those trial rights, and rejecting arguments that a heightened "clear and unmistakable" or "voluntary, knowing, and intelligent" standard applied to the waiver); *Sydnor*, 252 F.3d at 307 (holding that "the right to a jury trial attaches in the context of judicial proceedings after it is determined that litigation should proceed before a court," and the fact that the parties agreed to waive their right to a jury trial did not require the court to evaluate the arbitration agreement under a more demanding standard); *Koveleskie*, 167 F.3d at 368 (evaluating arbitration agreement under general contract principles and rejecting Seventh- and Fifth-Amendment waiver arguments because there was no constitutional right to a jury trial for claims subject to the arbitration clause and the arbitral forum adequately protects an employee's substantive and procedural statutory rights); *Seus*, 146 F.3d at 183-84 (holding that applying a heightened knowing-and-voluntary standard to arbitration

[13] We note that Gulfstream's DRP *expressly* stated that the employee and Gulfstream *both* waived the right to a jury trial regarding covered claims and explained in detail the mandatory dispute resolution process. Further, even without that express statement, "the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." *Sydnor*, 252 F.3d at 307. Thus, the plaintiffs' acceptance of the DRP probably would satisfy even a heightened "knowing and voluntary" standard in any event. *See Cooper*, 367 F.3d at 506 (concluding that entering into an arbitration agreement evidences a knowing and voluntary waiver of trial rights because the waiver of the right to a jury trial is an obvious and necessary consequence of entering into an arbitration agreement).

agreements would be inconsistent with the FAA and *Gilmer*).[14]

Thus, we proceed to the plaintiffs' final issue in the case – whether the DRP is a binding contract between the plaintiffs and Gulfstream under ordinary Georgia contract law.[15]

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[14] *But see Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 381 (6th Cir.2005) (holding arbitration agreement waiver of jury right to "knowing and voluntary" standard); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir.1994) (concluding that "a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration").

[15] The plaintiffs further argue that a "knowing and voluntary" showing is required by the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f)(1), which applies to each of the plaintiffs' ADEA claims and requires any waiver of rights under the Act to be knowing and voluntary. However, this claim also is unpersuasive. "[T]he OWBPA protects against the waiver of a right or claim, not against the waiver of a judicial forum." *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 660 (5th Cir.1995); *Seus*, 146 F.3d at 183 n. 2 (same).

The plaintiffs also argue that Georgia law precludes waiver of jury trial rights in contracts, based largely on *Bank South, N.A. v. Howard*, 264 Ga. 339, 444 S.E.2d 799, 799-800 (1993). *Howard*, however, concerned a jury trial waiver in a guaranty agreement and did not involve an arbitration agreement. In *Howard*, the parties did not mutually agree to arbitrate covered claims; rather, the guarantor merely agreed to waive its right to a jury in any civil action filed to enforce the guaranty. Thus, when Bank South sued Howard, the trial court struck Howard's jury demand. Reversing, the Georgia Supreme Court declined to enforce in a civil action a pre-litigation waiver of a jury trial in that civil action. In contrast, Georgia courts have upheld arbitration agreements. *See, e.g., Wise v. Tidal Const. Co., Inc.*, 261 Ga.App. 670, 583 S.E.2d 466, 471 (2003) ("Under the FAA, written agreements to arbitrate contained in contracts involving interstate commerce are valid and enforceable in federal and state courts." (quotation marks and citation omitted)). In any event, the FAA and federal law controls the waiver issue.

E. Enforceability Under Georgia Law

The plaintiffs argue that, for various reasons, the DRP is not a binding contract under applicable Georgia law, and thus there is no underlying agreement to arbitrate to be enforced. Specifically, they argue that under Georgia law governing contracts (1) the DRP did not constitute an offer, (2) their continued employment did not constitute acceptance of the DRP, (3) there was no consideration for their obligations under the DRP, and (4) in any event, the DRP is unconscionable. We address each of the plaintiffs' contentions in turn.

1. Offer

The plaintiffs argue that the DRP does not constitute an "offer." We disagree. "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Restatement (Second) of Contracts,* § 24. The DRP clearly states that it is a contract, establishes the terms of the contract, and explains the means of accepting the contract. Thus, the DRP plainly constituted an offer.

The plaintiffs argue that no valid offer exists because the DRP allows Gulfstream to modify the DRP unilaterally. Thus, according to the plaintiffs, any promise by Gulfstream is illusory and not an offer. However, under Georgia law, "[a] promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." *Kemira, Inc. v. Williams Investigative & Sec. Servs., Inc.,* 215 Ga.App. 194, 450 S.E.2d 427, 431 (1994) (quotation marks and citation

omitted). Furthermore, an "illusory promise" exists when "words of promise . . . by their terms make performance entirely optional with the 'promisor' whatever may happen, or whatever course of conduct in other respects he may pursue." *Id.* (quotation marks and citation omitted).

Here, the DRP allows Gulfstream to modify the DRP only on notice, and the version of the DRP in effect at the time a claim is received governs the claim. As a result, Gulfstream is bound by the terms of the DRP with regard to covered claims, and its promise to be bound is thus not illusory. *See, e.g., Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC,* 379 F.3d 159, 174-75 (5th Cir.2004) ("The fact that the company has the right to change the terms upon notice does not mean that the contract never bound it."); *Blair,* 283 F.3d at 604 (promise not illusory where employer retained unilateral power to modify employee handbook but was required to provide notice before doing so). Thus, we easily conclude that an offer exists under Georgia contract law.

2. Acceptance

The plaintiffs also contend that they cannot be deemed to have accepted the terms of the DRP simply by their continued employment, even though the DRP expressly provides that continued employment is the proper means of acceptance. However, we agree with the district court that the employees accepted the DRP through continued employment.

Under general principles of Georgia contract law, "'[a]n offer may be accepted . . . either by a promise to do the thing contemplated therein, or by the actual doing of the thing.'" *Moreno v. Strickland,* 255 Ga.App. 850, 567

S.E.2d 90, 92 (2002) (quoting *Herring v. Dunning*, 213 Ga.App. 695, 446 S.E.2d 199, 199 (1994)). However, "'[t]he offer must be accepted in the manner specified by it; and if it calls for a promise, then a promise must be made; or if it calls for an act, it can be accepted only by the doing of the act.'" *Id.* (quoting *Herring*, 446 S.E.2d 199); *see also State v. U.S. Oil Co.*, 194 Ga.App. 1, 389 S.E.2d 498, 498 (1989) (performing under a contract constitutes acceptance).

This general contract principle is no less applicable in the context of an employment contract. Georgia courts have held that an employee can accept new terms of employment of which the employee is aware by remaining in employment. *See Fletcher v. Amax, Inc.*, 160 Ga.App. 692, 288 S.E.2d 49, 51 (1981) ("It is the accepted law of this state that an additional compensation plan offered by an employee, by remaining in employment, constitutes a contract between them. . . .").[16]

Here, the DRP and the cover letter distributed with it clearly announced that the DRP was a contract, that "acceptance of employment or the continuation of employment by an individual shall be deemed to be acceptance of the DRP," that no signature would be required for the

[16] We have located, and the parties have cited, no case applying this principle in the context of an arbitration agreement. However, to the extent Georgia law might attempt to apply a different rule to arbitration agreements from contracts generally, that rule would be preempted by the FAA, and the generally applicable principles would govern. *See Perry*, 482 U.S. at 492 n. 9, 107 S.Ct. at 2527 n. 9 ("[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."); *see also David L. Threlkeld & Co.*, 923 F.2d at 250 (holding that Vermont statute requiring that arbitration agreement be signed was preempted by the FAA).

policy to be applicable, and that the policy would be a condition of continued employment. Thus, the DRP expressly established that the proper manner of accepting its terms was continued employment. Under Georgia law, then, the plaintiffs' act of continued employment constituted acceptance of the DRP. *Moreno,* 567 S.E.2d at 93 ("'The offer must be accepted in the manner specified by it; and if it calls for a promise, then a promise must be made; or if it calls for an act, it can be accepted only by the doing of the act.'") (quoting *Herring,* 446 S.E.2d at 203).

The plaintiffs also assert that remaining in Gulfstream's employ could not be an act of acceptance of the DRP because it simply continued the status quo; by continuing in employment, the plaintiffs performed no distinct, unambiguous act, but instead acted as they had in the past and as they would have in the absence of the DRP. We reject this argument. While the plaintiffs did continue their pre-DRP conduct by remaining in Gulfstream's employ, they did so in the face of changed circumstances. By specifying the manner of acceptance as continued employment and announcing that the DRP was a condition of employment, the DRP and accompanying letter plainly set forth two options for Gulfstream employees: (1) continue in employment, thereby accepting the DRP, or (2) terminate employment. Thus, given these two options, the employees' remaining in Gulfstream's employ after notice of the DRP was an unambiguous act of acceptance of the DRP.

Although Georgia law controls this issue, we note that our decision falls well within the mainstream of contract law. Both the Seventh and the Fifth Circuits have come to the same conclusion under similar circumstances, applying

Wisconsin, Mississippi, and Louisiana law. In *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 730-33 (7th Cir.2002), an employee asserted that she never signed nor otherwise accepted her employer's unilaterally promulgated arbitration policy. Because the policy explicitly stated that remaining employed past the effective date evidenced assent to the policy and the employee remained on the job past the effective date, the Seventh Circuit concluded that she was deemed to have agreed under Wisconsin law.[17] *Id.* at 734-36. Similarly, in *May v. Higbee Co.*, 372 F.3d 757, 764 (5th Cir.2004), the Fifth Circuit applied Mississippi law and held that an employee manifested assent in her employer's unilaterally promulgated arbitration policy by continuing employment where she received a notice advising her of the rules and stating that continued employment would be deemed acceptance. The Fifth Circuit reached the same conclusion under Louisiana law in *Marino v. Dillard's, Inc.*, 413 F.3d 530, 532 (5th Cir.2005).[18]

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[17] In support of their position, plaintiffs cite an unpublished Sixth Circuit case holding that an employee was not bound by an employer's arbitration policy. *Lee v. Red Lobster Inns of Am., Inc.*, 92 Fed.Appx. 158 (6th Cir.2004) (unpublished). However, in that case, the employee was not informed that her continued employment would manifest acceptance. In fact, the Sixth Circuit specifically distinguished and agreed with the Seventh Circuit's *Tinder* decision, as follows: "The case at bar is distinguishable, of course, from cases in which employer-distributed materials told employees that their continuing to work would constitute acceptance of the employer's plan." *Id.* at 163 n. 4. Citing *Tinder*, the Sixth Circuit continued, "In those cases, an employee's remaining at work past the effective date of the policy was properly construed as manifestation of an agreement to be bound." *Id.*

[18] We recognize that in *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546 (1st Cir.2005), the First Circuit concluded that a dispute resolution policy circulated to employees via a "link" at the

(Continued on following page)

We thus conclude that the plaintiffs' continued employment with Gulfstream after receipt of the DRP and

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bottom of an email was not binding on the employees. However, that case is both factually and legally distinguishable. Factually, in *Campbell*, the circulated message did not inform employees that the dispute resolution policy was a contract and that an employee would accept by continuing employment; rather, that information was contained in a separate brochure available at a link attached to the email message.

Further, as a legal matter, the *Campbell* court did not conclude that the alleged contract was unenforceable under generally applicable state law; rather, it concluded that it would be "inappropriate" to enforce the contract because the employees did not receive adequate notice. This appropriateness requirement, first applied by the First Circuit in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 19 (1st Cir.1999), stems from the language of Title VII stating that alternative means of dispute resolution, including arbitration, are encouraged to resolve disputes under the Civil Rights Act "[w]here appropriate and to the extent authorized by law." *Id.* at 9, 19 (concluding, based on language of Title VII, that arbitration agreement should be enforced only where "appropriate" and finding enforcement inappropriate where employer never provided employee with details of arbitration policy).

However, other courts have concluded that arbitration is "appropriate" for purposes of the Civil Rights Act where the FAA would require arbitration; the appropriateness language thus creates no additional requirement for an arbitration agreement to be enforceable. *See, e.g., Seus*, 146 F.3d at 183 (interpreting clause as a reference to the FAA). As the *Campbell* court acknowledged, "other courts have not flocked to adopt *Rosenberg*'s reading of the word 'appropriate.'" 407 F.3d at 553 n. 5. This Circuit has not adopted the *Rosenberg* "appropriate" requirement, and we decline to do so in this case.

In any event, we further note that Gulfstream's DRP did provide extensive details regarding its arbitration policy. *See Weeks*, 291 F.3d at 1314 (noting that the purpose of § 118 is to encourage rather than preclude arbitration and that claims under federal statutes are enforceable under the FAA).

accompanying clear notice constituted assent to the DRP's terms.[19]

3. Consideration

The plaintiffs next argue that the arbitration agreement is unenforceable because there is no "bargained for consideration" for their relinquishment of trial rights. They argue that the employees got nothing in return.

This argument is unavailing. Georgia law provides that mutual promises and obligations are sufficient consideration to support a contract. *See Atlanta Six Flags P'ship v. Hughes*, 191 Ga.App. 404, 381 S.E.2d 605, 607 (1989) ("[T]he mutual promises and obligations of the parties constituted sufficient consideration for the contract."). Here, the plaintiffs received reciprocal promises from Gulfstream to arbitrate and be bound by arbitration in covered claims. In addition, the DRP provides that Gulfstream will pay the arbitration and mediation costs. These promises constitute bargained-for consideration.

The plaintiffs also argue that there is no consideration because Gulfstream's promises are illusory because they can modify the DRP at any time. As explained above, this argument lacks merit because Gulfstream, unlike the employers in the cases cited by the plaintiffs, can modify

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[19] The plaintiffs also argue that the agreement is ineffective because the employer cannot "agree on behalf of the employee." They cite cases holding that a union cannot agree on behalf of an employee. These cases are irrelevant. Of course the employer cannot agree for the employee; here, the district court properly determined that the employee agreed on the employee's own behalf – the employer simply set forth the means for acceptance of its offer.

the DRP only upon notice and is bound by the DRP in effect at the time it receives a claim. *See Rushing v. Gold Kist, Inc.*, 256 Ga.App. 115, 567 S.E.2d 384, 388-89 (2002) (holding that arbitration agreement was supported by sufficient consideration where offeror retained right to modify the disputes subject to arbitration under the agreement because they were equally bound by the policy's provisions); *see also Iberia*, 379 F.3d at 174-75 ("The fact that the company has the right to change the terms upon notice does not mean that the contract never bound it."); *Blair*, 283 F.3d at 604 (same).

The plaintiffs further argue that there are no mutual promises because only those causes of action likely to be brought by an employee are "covered claims," while the DRP allows court action for causes of action that would likely be brought by Gulfstream (such as trademark and trade secret claims and noncompetition violations).[20] However, the obligations are reciprocal for the class of covered claims. Thus, bargained-for consideration amply supported the DRP.

4. Unconscionability

Finally, the plaintiffs argue that the DRP is unenforceable because it is both procedurally and substantively unconscionable.

They first argue that the DRP is procedurally unconscionable due to the employee's lack of bargaining power.

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[20] This assertion is not entirely true. For example, certain claims that would be brought by an employee, such as workers' compensation claims, are *not* covered, while tort claims (e.g., a suit for intentional interference with contract) are covered.

In support, they cite various Georgia cases acknowledging the unequal bargaining power between an employer and employee, but none holding that such contracts are unconscionable as a result of that disparity. Indeed, Georgia courts have enforced standard-form arbitration agreements in employment relationships. *Rushing*, 567 S.E.2d at 388-89.

Under Georgia law, "[p]rocedural unconscionability addresses the process of making the contract, while substantive unconscionability looks to the contractual terms themselves." *NEC Techs., Inc. v. Nelson*, 267 Ga. 390, 478 S.E.2d 769, 771 (1996). In determining whether a contract is procedurally unconscionable, Georgia courts look to the following factors: "age, education, intelligence, business acumen and experience of parties, their relative bargaining power, the conspicuousness of and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of meaningful choice." *Id.* at 772.

Although there is some bargaining disparity here, as often in the employment context, the plaintiffs have failed to show that the DRP and its making is so one-sided as to be unconscionable. Its terms are clear and were presented to employees with a cover letter reflecting the importance of the policy, and its terms are not oppressive. Under these circumstances, the plaintiffs have failed to show that the DPR is procedurally unconscionable. *See Gilmer*, 500 U.S. at 32-33, 111 S.Ct. at 1655 ("Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements [are unenforceable]."); *Saturna v. Bickley Constr. Co.*, 252 Ga.App. 140, 555 S.E.2d 825, 827 (2001) ("Further, lack of sophistication or economic disadvantage of one attacking arbitration will not amount to unconscionability."

(quotation marks and citation omitted)); *see also Oblix, Inc. v. Winiecki*, 374 F.3d 488, 490 (7th Cir.2004) (applying California law and concluding fact that employee's employment was conditioned on arbitration agreement offered on a take-it-or-leave-it basis did not render it unconscionable).

Finally, the plaintiffs assert that certain terms of the DRP are substantively unconscionable. Specifically, they argue that the following aspects of the DRP are unconscionable: (1) Gulfstream's reservation of rights to sue for claims it may have while confining employees to arbitration for their likely causes of action; (2) the prohibition of class actions; (3) Gulfstream's reservation of the right to modify the DRP; (4) the limitations on discovery; (5) the "cloaking of DRP process in secrecy"; and (6) the one-way aspects of the process.

Under Georgia law, an unconscionable contract is "such an agreement as no sane man not acting under a delusion would make and that no honest man would take advantage of." *Hall v. Fruehauf Corp.*, 179 Ga.App. 362, 346 S.E.2d 582, 583 (1986). None of the provisions challenged by the plaintiffs offends this standard.

Under the DRP, some claims, many of which would typically be brought by an employee, are subject to arbitration and others, many of which would be brought by Gulfstream, are not. However, this fact does not render the DRP unconscionable. The promises are mutual: both parties are required to arbitrate covered claims, and neither is required to arbitrate non-covered claims. The cases cited by the plaintiffs, which suggest that an arbitration agreement is unconscionable due to lack of mutuality if only the employee is required to arbitrate, are inapposite. In any

event, Georgia law provides that "an arbitration provision [is] not unconscionable because it lack[s] mutuality of remedy." *Saturna*, 555 S.E.2d at 827.

The plaintiffs further argue that the DRP is unconscionable because it precludes class actions and because it limits discovery by allowing the taking of depositions only if authorized by the arbitrator. We disagree. "As the Supreme Court has explained, the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition,'" *see Gilmer*, 500 U.S. at 31, 111 S.Ct. 1647, 114 L.Ed.2d 26 (internal quotation marks omitted), "characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims." *Iberia*, 379 F.3d at 174-75 (enforcing arbitration agreement with class-action prohibition and rejecting position that it was unconscionable because it immunized company from low-value claims); *see also Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 816 (11th Cir.2001) (enforcing arbitration of TILA claims even though arbitration agreement precluded class actions under TILA).[21] The DRP's prohibition of class actions and discovery limitations are consistent with the goals of "simplicity, informality, and expedition" touted by the Supreme Court in

[21] We recognize that the Ninth Circuit in *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1176 (9th Cir.), *cert. denied*, 540 U.S. 1160, 124 S.Ct. 1169, 157 L.Ed.2d 1204 (2003), found such a clause unconscionable. However, the Ninth Circuit was applying a California-law rebuttable presumption of unconscionability in employer-employee arbitration agreements. Georgia courts, unlike California courts, typically enforce contracts between parties of unequal bargaining positions, including in the employment context, and apply no such presumption.

Gilmer. *See Gilmer*, 500 U.S. at 31, 111 S.Ct. 1647, 114 L.Ed.2d 26.

The plaintiffs next argue that the DRP unconscionably requires that the parties not disclose transcripts from the arbitration or the arbitrator's award. In many employment claims, both sides might well prefer confidentiality. *See Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 8 n. 4 (1st Cir.1999) (observing that both sides might desire confidentiality); *see also Iberia*, 379 F.3d at 175 (same, in cellular customer-provider context). We thus agree with the Fifth Circuit that while the confidentiality agreement might be more favorable to employers (as "repeat players") than to individual employees, it is not so offensive as to be invalid. *Iberia*, 379 F.3d at 175.[22]

Finally, the plaintiffs argue that several asymmetries in the DRP render it unconscionable. Specifically, they point to the fact that employees but not Gulfstream are required to exhaust steps prior to arbitration, that employees are prohibited from having counsel in the first two internal steps of the process, and that 30-day deadlines are imposed on employees but not on Gulfstream. Plaintiffs cite no Georgia authority for this argument. These provisions are reasonably designed to resolve claims as quickly and efficiently as possible, consistent with the goals of arbitration, and not so offensive as to be unconscionable.

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[22] Gulfstream also points out that the confidentiality of settlements provides a helpful (although not perfect) analog.

III. CONCLUSION

For the foregoing reasons, we conclude that the DRP constitutes an enforceable agreement to arbitrate, and the district court properly granted defendants' motions to dismiss and to compel arbitration. The district court's rulings are affirmed.

AFFIRMED.

333 F.Supp.2d 1367

United States District Court,
N.D. Georgia, Atlanta Division.
Lee CALEY; William Etzel; Stanley Walker;
and all persons similarly situated, Plaintiffs,
v.
GULFSTREAM AEROSPACE CORPORATION;
and General Dynamics Corporation, Defendants.
Dianne Jackson; Marlon Green; Robert Vouk; Willie Mae
Stewart; and all persons similarly situated, Plaintiffs,
v.
Gulfstream Aerospace Corporation; and
General Dynamics Corporation, Defendants.

Nos. CIV.A. 1:03-CV-3486-ODE,
CIV.A. 1:03-CV-3487-ODE.

Aug. 24, 2004.

Harlan Stuart Miller, III, Miller, Billips & Ates, Atlanta, GA, for Plaintiffs.

James H. Cox, III, Greenberg Traurig, Atlanta, Wade W. Herring, II, and Shawn A. Kachmar, Hunter Maclean Exley & Dunn, Savannah, for defendant.

ORDER

ORINDA D. EVANS, Chief Judge.

These related civil actions seeking damages and equitable relief are presently before the Court on Defendants' motions to compel arbitration and to dismiss [*Caley*-# 3, *Jackson*-# 3], Plaintiffs' motions to compel discovery [*Caley*-# 26, *Jackson*-# 23], Plaintiffs' motions for partial summary judgment [*Caley*-# 29, *Jackson*-# 26] and Defendants' motions to strike or stay Plaintiffs' motions for summary judgment [*Caley*-# 33, *Jackson*-# 28].

I. *Background*

Both of these cases were filed on November 17, 2003. The *Caley* complaint asserts claims on behalf of an estimated class of two hundred workers under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, against Defendant Gulfstream and its parent company, Defendant General Dynamics. The complaint charges Defendants with violating the FLSA by deliberately mischaracterizing Plaintiffs as exempt from overtime pay requirements, and therefore failing to pay Plaintiffs the monies they were owed for hours worked in excess of forty per week. Counsel for Plaintiffs in that action also filed the *Jackson* complaint on behalf of an estimated class of one hundred workers, charging the same Defendants with violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140, and asserting certain other contract claims under Georgia law. The *Jackson* complaint also sets forth individual claims of race discrimination for Plaintiffs Jackson, Vouk, Green and Stewart, a claim of retaliation by Jackson and a gender discrimination claim by Vouk under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, along with a retaliation claim by Vouk under the FLSA, 29 U.S.C. § 215(a).

In response to the *Caley* and *Jackson* complaints, Defendants did not file answers but rather filed the pending motions to compel arbitration of Plaintiffs' claims and to dismiss the actions. On March 8, 2004, Plaintiffs filed Rule 56(f) motions to hold Defendants' motions to compel arbitration and to dismiss in abeyance pending the

completion of discovery. The same day, Plaintiffs also filed motions to amend the complaint in each action to assert certain contract defenses and to seek a declaratory judgment to the effect that the arbitration agreement in question is unenforceable.

On March 10, 2004, Defendant General Dynamics filed a motion in each case, later joined by Defendant Gulfstream, to designate and treat the *Caley* and *Jackson* actions as related. On March 26, 2004, said motions were granted.

On April 16, 2004, a hearing was held and a verbal order entered deferring ruling on Defendants' motions to compel arbitration and to dismiss, granting in part Plaintiffs' Rule 56(f) motions for the limited purpose of supplementing the record on the issue of consent to arbitrate, and granting Plaintiffs' motions to amend the complaints. The parties were given sixty days to supplement the record on the issue of consent.

On June 15, 2004, Defendants filed supplemental briefs in support of their motions to compel arbitration. That same day, Plaintiffs filed the pending motions to compel discovery. Subsequently, on July 15, 2004, Plaintiffs filed motions for partial summary judgment as to whether the at-issue arbitration agreement is enforceable. Defendants have moved to strike or stay Plaintiffs' motions for partial summary judgment.

II. *Facts*

The named plaintiffs in both *Caley* and *Jackson* are current and former employees[1] of Gulfstream[2] who were employed at its Savannah, Georgia facility during the relevant period from summer of 2002 until spring of 2003. During the summer of 2002, Gulfstream decided to adopt a dispute resolution policy ("DRP") to serve as the sole method for resolving covered employment-related disputes between itself and its employees. On or about July 15, 2002, Gulfstream mailed to all of the workers employed at its Savannah facility a copy of the DRP, an explanatory cover letter and a question and answer form. Said documents were mailed by an outside company, Advantage Marketing, using first-class postage, and were sent to the employee addresses on file with Gulfstream's human resources department – the same addresses to which employee W2 forms and benefit statements are mailed. Beyond mailing the aforementioned documents to its employees, Gulfstream placed the DRP and accompanying informational documents on the company intranet, and

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[1] In *Caley*, Plaintiffs Etzel and Walker are current Gulfstream employees; Plaintiff Caley voluntarily resigned in July of 2003. In *Jackson*, all named Plaintiffs were laid off as part of a reduction-in-force on April 11, 2003, a day after the effective date of the modified dispute resolution policy.

[2] As previously noted, Defendant General Dynamics is the parent company of Defendant Gulfstream. For ease of understanding and flow, reference will only be made to Gulfstream, Plaintiffs' immediate employer. However, it should be noted that both Gulfstream and General Dynamics are covered by the at-issue dispute resolution policy. (*Caley*-# 25, *Jackson*-# 22, Ex. 4 (hereinafter "4/10/03 DRP") at 3 ("Covered claims are employment-related claims between an individual Employee and the Company, its parents, subsidiaries and affiliates, and their respective individual managers and other present or former employees").)

further distributed the DRP electronically through the Management Newsletter that is emailed to approximately 1,000 employees. Furthermore, Gulfstream also posted notices relating to implementation of the DRP, but not the DRP itself, on thirteen bulletin boards throughout the Savannah facility.

The cover letter mailed with the DRP on July 15, 2002 read in part, "The DRP will become the exclusive procedure to resolve covered workplace disputes – so you should carefully read the enclosed brochure. This policy, which will become effective on August 1, 2002, will be a condition of continued employment. All covered claims will be subject to this DRP at that time." (*Caley*-# 25, *Jackson*-# 22, Ex. 1, Att. 1 (hereinafter "8/1/02 DRP") at 11.)

The DRP itself sets up a four-level dispute resolution process for all "covered claims" including: level one-human resources review, level two-management review, level three-mediation and level four-arbitration. Employees must complete each level of the process before proceeding to the next. Furthermore, an employee must proceed to the next level within thirty days following completion of the previous level or all rights to pursue the covered claims are waived.[3] Gulfstream "may elect to bypass one or more steps prior to arbitration for disputes with applicants for employment, with former employees, or if the Company is

[3] For those disputes that do proceed to mediation, Gulfstream pays administrative fees, mediator fees and expenses, rental fees for mediation location and the employee's salary, if still employed by the company, for time spent at mediation. Likewise, if arbitration is required, Gulfstream pays similar costs except that employee salary while at arbitration is capped at seven days and the employee must pay a $100.00 filing fee. Also, the arbitrator may award reasonable experts' and/or attorneys' fees to the employee.

the initiating party," and no time-based waiver applies to the company. (8/1/02 DRP at 1.)

The DRP defines covered claims as "employment-related claims between an individual Employee and the Company, its individual managers and other present or former employees." (8/1/02 DRP at 1.) Said definition is followed by examples of those claims which are covered by the DRP and a list of excluded claims such as claims covered by the National Labor Relations Act and claims for workers' compensation benefits. Plaintiffs do not dispute that the claims asserted in this lawsuit are covered claims.

The DRP also sets forth specific rules for discovery at the arbitration stage of the process. The policy calls for disclosure of witnesses and documents at least twenty days prior to the arbitration hearing, endows the arbitrator with the power to issue protective orders, allows for depositions by the agreement of the parties or by order of the arbitrator, and invests the arbitrator with the power to resolve all discovery disputes.

The DRP explicitly provides that it is the sole and exclusive remedy for covered claims and that employees and Gulfstream waive any right to jury trial for such claims. The policy further provides that Gulfstream retains the right to modify or terminate the DRP following thirty days written notice, and that the policy in effect at the time a claim is received shall govern the process by which the claim is determined.

On the third page of the DRP, under an underlined heading entitled "*Acceptance/No Change In Terms of Employment,*" the policy states,

The submission of an application, acceptance of employment or *the continuation of employment by an individual shall be deemed acceptance of the DRP. No signature shall be required for the Policy to be applicable.* The mutual obligations set forth in this DRP shall constitute a contract between the Employee and the Company but shall not change an Employee's at-will relationship or any term of any other contract or agreement between the Company and Employee. This Policy shall constitute the entire agreement between the Employee and Company for the resolution of Covered Claims.

(8/1/02 DRP at 3 (emphasis added).) The effective date of the DRP, August 1, 2002, is listed prominently as part of the title heading on the first page of the policy. Plaintiffs in both the *Caley* and *Jackson* matters were employees of Gulfstream at the time of the mailing and posting of notices of the DRP, and they remained in such employment past the policy's effective date.

In March 2003, Gulfstream set about modifying certain terms of the DRP. Accordingly, on or about March 7, 2003, Gulfstream distributed and noticed the new version of the DRP by utilizing the same methods that were used in the policy's initial adoption. The terms of the modified DRP were substantially similar to those of the original. However, certain changes were made, including the prohibition of bringing claims as class or collective actions. (4/10/03 DRP at 3.) Again, an employee's acceptance of the modified DRP was deemed from continuation of employment. The effective date of the modification was April 10, 2003. Plaintiffs were employed when notice of the DRP revision was given and were still employed on April 10, 2003. As noted previously, the *Jackson* named plaintiffs were laid off on April 11, 2003.

When the *Caley* and *Jackson* putative class action complaints were filed counsel for Defendants demanded that Plaintiffs' claims be arbitrated. Said demand was rejected.

III. *Defendants' Motions To Compel Arbitration and To Dismiss*

Defendants ask the Court to compel arbitration of all claims in both *Caley* and *Jackson* and to dismiss both actions.[4] Plaintiffs oppose Defendants' motions, challenging the enforceability of the DRP based upon their contentions that the policy is unenforceable under the FAA, that Plaintiffs' continuation of employment did not constitute a waiver of their rights, and that the policy is unenforceable under Georgia law.

In determining whether a motion to compel arbitration should be granted, a court must analyze whether "'(1) there is a valid written agreement to arbitrate; (2) the issue [sought to be arbitrated] is arbitrable under the agreement; and (3) the party asserting the claims has failed or refused to arbitrate the claims.'" *Lomax v. Woodmen of the World Life Ins. Soc'y*, 228 F.Supp.2d 1360, 1362 (N.D.Ga.2002) (quoting *Collins v. International Dairy Queen, Inc.*, 2 F.Supp.2d 1465, 1468 (M.D.Ga.1998)). The sole contested issue before the Court is whether the DRP constitutes a valid, written agreement to arbitrate between the parties.

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[4] Because the *Caley* and *Jackson* plaintiffs' interests are coextensive on the issue of arbitration, no distinction between the two cases will be made in the Court's analysis; reference will only be made to "Plaintiffs."

Under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, a written agreement to arbitrate is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.[5] As such, "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas,* 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). However, the FAA preempts state law to the extent it treats arbitration agreements in a different manner than other contracts. *Id.* Thus, in the present matter, general Georgia contract law applies in the determination of whether a binding agreement to arbitrate exists between the parties.[6]

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[5] The Court rejects Plaintiffs' assertion that the FAA is inapplicable to the DRP based on their contention that the underlying at-will employment relationship does not affect commerce. *See Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 277, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (finding FAA's use of "involving commerce" evidences congressional intent to exercise its commerce power to fullest extent). Likewise, the Court is satisfied that, under Georgia law, the DRP constitutes "an agreement in writing" or "a written agreement" within the meaning of the FAA, 9 U.S.C. §§ 3 & 4. *See Comvest, L.L.C. v. Corporate Sec. Group, Inc.,* 234 Ga.App. 277, 507 S.E.2d 21, 24-25 (Ga.Ct.App.1998) (enforcing unsigned, written arbitration agreement under FAA).

[6] Plaintiffs' claim that a heightened "knowing and voluntary" waiver standard applies flies in the face of both the explicit wording of the FAA, 9 U.S.C. § 2 (noting written agreements to arbitrate are "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*") (emphasis added), and United States Supreme Court precedent finding that "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer v. Interstate/Johnson Lane, Corp.,* 500 U.S. 20, 26, 111 S.Ct. 1647,

(Continued on following page)

The basic requirements for a binding contract under Georgia law are (1) a definite offer and (2) complete acceptance (3) for consideration. *Moreno v. Strickland,* 255 Ga.App. 850, 567 S.E.2d 90, 92 (2002). Plaintiffs attack all three of these elements.

Initially, Plaintiffs contend that the DRP is an unenforceable corporate policy that cannot form the basis of a valid offer. It is clear that under Georgia law "not all provisions in employee manuals are to be considered binding agreements." *Ellison v. DeKalb County,* 236 Ga.App. 185, 511 S.E.2d 284, 285 (1999). For example, "personnel manuals stating that employees can be terminated only for cause and setting forth termination procedures are not contracts of employment; failure to follow the termination procedures contained in them is not actionable." *Jones v. Chatham County,* 223 Ga.App. 455, 477 S.E.2d 889, 893 (1996). Such employer policies do not represent enforceable contracts based on Georgia's strict adherence to the employment at will doctrine. *See Nelson v. M & M Products Co.,* 168 Ga.App. 280, 308 S.E.2d 607, 608 (1983) ("The law is clear in this state that in the 'absence of a controlling contract between the parties, employment for an indefinite period-a 'permanent job'-is terminable at the will of either party, and a discharge in such circumstances affords no cause of action for breach of contract.'") (quoting *Land v. Delta Air Lines,* 130 Ga.App. 231, 203 S.E.2d 316 (1973)). However, in contrast to policies that purport to create "for cause" termination requirements and procedures, other employer policies that

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114 L.Ed.2d 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)).

represent offers to be bound can form the basis of binding contracts. *Ellison,* 511 S.E.2d at 285; *see also Dodd v. City of Gainesville,* 250 Ga.App. 722, 551 S.E.2d 62, 64 (2001) ("Even an at-will employee may have certain enforceable rights pursuant to the policies of an employment handbook."). In the present matter, the Court finds that the DRP represents an offer by Defendants to be bound to the terms set forth in the policy. (8/1/02 DRP & 4/10/03 DRP at 3 ("The mutual obligations set forth in this DRP shall constitute a contract between the Employee and the Company. . . .").) As such, the Court finds that the DRP was an offer by Defendants capable of forming the basis of an enforceable contract.

Having found that the DRP represented a valid offer, the issue becomes whether Plaintiffs accepted Defendants' offer. The DRP clearly states that "the continuation of employment by an individual shall be deemed to be acceptance of the DRP. No signature shall be required for the Policy to be applicable." (8/1/02 DRP & 4/10/03 DRP at 3.) An "'offer must be accepted in the manner specified by it; . . . if it calls for an act, it can be accepted only by the doing of the act.'" *Moreno,* 567 S.E.2d at 93 (quoting *Herring v. Dunning,* 213 Ga.App. 695, 446 S.E.2d 199 (1994)). As a matter of law, then, Defendants' offer was open to acceptance through Plaintiffs' continuation of employment. *See also Fletcher v. Amax, Inc.,* 160 Ga.App. 692, 288 S.E.2d 49, 51 (1981) (noting continued employment constitutes acceptance of new term of employment offered by employer). The issue remains, however, as to whether Plaintiffs had notice of the mandatory arbitration provision of the DRP such that their continued employment served as acceptance thereof.

As noted above, Defendants have proffered evidence that both the August 2002 and April 2003 versions of the DRP and explanatory documents were mailed to Plaintiffs' addresses on file with Gulfstream's human resources department. Such evidence raises a presumption Plaintiffs received notice of the DRP. *See Konst v. Florida E. Coast Ry. Co.*, 71 F.3d 850, 851 (11th Cir.1996) (noting rebuttable presumption that item mailed was properly received by addressee). Moreover, Defendants have also put forth evidence showing that notices concerning implementation of the DRP were posted on bulletin boards throughout Gulfstream's Savannah facility, and that the DRP and accompanying documents were posted on the company intranet and distributed via email. In the face of such evidence, Plaintiffs must present evidence to overcome the inference that they knew that continued employment constituted an acceptance of the mandatory arbitration program.

In the *Caley* case, each of the three named Plaintiffs, Caley, Etzel and Walker, have filed multiple declarations under penalty of perjury. (*Caley* # 7, Exs. 4, 5 & 6; *Caley*-# 28, Exs. A, B & C.) None of them deny having received either version of the DRP or notice thereof. Instead, Plaintiffs generally assert that, "[a]ssuming that copies of the DRP were in fact mailed on July 15, 2002," they were "not qualified nor competent to assess the legal effect, significance or possible consequences of the DRP," and note that adequate time was not provided to consult with an attorney. (*Caley*-# 28, Exs., A, B & C at ¶¶ 4, 11-12.) The Court finds that these assertions are insufficient to overcome the inference that Caley, Etzel and Walker had actual notice of the compulsory arbitration feature of the DRP. Thus, the Court finds these three Plaintiffs' continuation of

employment constituted acceptance of the original and modified DRP.

In the *Jackson* case, named Plaintiffs Jackson, Green and Stewart filed multiple declarations, (*Jackson*-# 9, Ex. A; *Jackson*-# 8, Exs. 4 & 5; *Jackson*-# 25, Exs. 1, 2 & 3), while Baker and Bacon[7] each filed a single declaration, (*Jackson*-# 25, Exs. D & E); Plaintiff Vouck filed no documentation. Although Jackson denies ever receiving "hard copies" of either DRP version via the company mailings, she admits receiving a copy of the August 2002 DRP in June or July 2002, and being asked as part of her work duties to incorporate the policy into the company intranet. Moreover, Jackson also discusses the methods used in implementation of the April 2003 DRP, and notes that flyers concerning the modified policy "may have been placed on company bulletin boards." (*Jackson*-# 9, Ex. A at ¶ 39.) As such, Jackson possessed sufficient notice of the compulsory arbitration provisions of both versions of the DRP for her continued employment to denote acceptance. Plaintiffs Green and Stewart deny that they were "ever informed of the existence or terms of the [August 2002] DRP" prior to its implementation. (*Jackson*-# 8, Exs. 4 & 5 at ¶ 3.) However, both Green's and Stewart's declarations state that "[l]ess than thirty days before the purported 'effective date' of the modified DRP (April 10, 2003), I received copy [sic] of the April 10, 2003 DRP." (*Jackson*-# 8, Exs. 4 & 5 at ¶ 17). Although Green's declaration, under the above-quoted typewritten statement, also contains an unidentified handwritten message stating, "Have no memory of seeing this paper until I was RIF [reduced in

[7] Baker and Bacon were added as named plaintiffs following filing of the initial complaint.

force]," (*Jackson*-# 8, Ex. 4 at 3), said statement is not initialed, and the Court finds that it at most offers conflicting evidence as to Green which fails to overcome the inference of notice. As such, the Court finds Green and Stewart possessed sufficient notice to bind them to at least the April 2003 DRP.[8]

Plaintiffs Baker and Bacon deny receiving a copy of the August 2002 DRP sent through the mail by Gulfstream. Nonetheless, neither Baker nor Bacon deny knowledge of the August 2002 policy prior to its implementation, and their declarations are silent with regard to the April 2003 DRP. Instead both Baker and Bacon, like the *Caley* plaintiffs, generally assert that, "[a]ssuming that copies of the DRP were in fact mailed on July 15, 2002," they were "not qualified nor competent to assess the legal effect, significance or possible consequences of the DRP," and note that adequate time was not provided to consult with an attorney. (*Jackson*-# 25, Exs. D & E at ¶¶ 4, 12-13.) Baker and Bacon's silence on the issue of notice is insufficient to overcome the inference of notice established by Defendants' evidence. As such, the Court finds Baker and Bacon's continuation of employment constituted acceptance of both versions of the DRP.

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[8] The August 2002 DRP established a thirty-day notice requirement for modification or termination of the policy, which serves to protect the reliance interest of employees. If Green and Stewart were unaware of the existence of the initial DRP, and therefore arguably were not parties to that agreement, they could not have relied upon the terms of the prior agreement. Thus the Court finds their knowledge of the April 2003 DRP prior to its implementation and continued employment thereafter suffices to establish their acceptance of the agreement as an original contract rather than a modification.

Finally, Plaintiff Vouck has offered no evidence on the issue of his knowledge of the implementation of the original and modified DRP. Furthermore, Defendants have offered affidavit evidence that Vouck knew Gulfstream was considering adopting a DRP in the summer of 2002, and that during that time period he forwarded articles on alternative dispute resolution to Gulfstream's director of employee relations, Michael Patton. (*Jackson*-# 22, Ex. 2 at ¶ 8.) In light of this evidence and Vouck's silence on the issue of notice, the Court finds Vouck's continuation of employment constituted acceptance of the original and modified DRP.

The lone state law issue left to be resolved with respect to contract formation is whether consideration exists to support the DRP.[9] The DRP explicitly notes the mutuality of obligation by which it is supported-a promise to arbitrate all covered claims is made by both parties. (4/10/03 DRP at 3 ("The Employee and Company agree and hereby waive any right to jury trial for any Covered Claim. . . . The mutual obligations set forth in this DRP shall constitute a contract between the Employee and the Company. . . .").) Georgia law clearly states that mutual promises and obligations are sufficient consideration to support a contract. *Atlanta Six Flags Partnership v. Hughes*, 191 Ga.App. 404, 381 S.E.2d 605, 607 (1989) ("[T]he mutual promises and obligations of the parties constituted sufficient consideration for the contract."); *Porter v. Cigna*, No. 1:96-CV-765-MHS, 1997 WL 1068630, at *1 (March 26, 1997) ("mutuality of obligation is established by explicit

[9] Further citation related to the DRP will be made to the April 2003 document in as much as it is the agreement alleged to be presently in effect.

policy language stating that both employer and employee are bound to submit employment disputes to arbitration."). Nevertheless, Plaintiffs attack the adequacy of consideration on multiple grounds. Plaintiffs contend that the DRP lacks bargained-for consideration because it was unilaterally implemented and that, furthermore, Defendants' promise to arbitrate is illusory because they retain the right to modify or terminate the DRP upon thirty days notice. Plaintiffs' arguments on these points are foreclosed by *Rushing v. Gold Kist, Inc.*, 256 Ga.App. 115, 567 S.E.2d 384 (2002). In *Rushing*, the court held that sufficient consideration existed to support an arbitration agreement which the offeror had proffered without input from the other party and which allowed the offeror to modify the disputes subject to arbitration under the agreement. *Id.* at 388-89. Accordingly, the Court finds the DRP to be supported by sufficient consideration.

Having established offer, acceptance and adequate consideration, the basic requirements for a binding, enforceable contract are satisfied with regard to the DRP. Furthermore, the Court is unpersuaded by Plaintiffs' claim of unconscionability. With regard to procedural unconscionability, while it is true that contracts related to employment inherently involve unequal bargaining power, Georgia courts enforce both contracts of adhesion as a general matter, *Mathis v. Orkin Exterminating Co.*, 254 Ga.App. 335, 562 S.E.2d 213, 215 (2002), and, more specifically, standard-form arbitration agreements in employment relationships. *Rushing*, 567 S.E.2d at 388-89. This finding of procedural fairness is also influenced by the DRP itself, a document the Court finds to possess clarity and to be unburdened with excessively confusing or unnecessary verbiage. Likewise, the terms of the DRP are

not substantively unconscionable. *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 31, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (noting limitations on discovery are part of inherent trade-off involved in arbitration process); *Lomax v. Woodmen of World Life Ins. Society,* 228 F.Supp.2d 1360, 1367 (N.D.Ga.2002) ("Generally, prohibiting class-wide arbitration does not render an otherwise valid arbitration clause unconscionable."). Accordingly, the Court finds the DRP to be an enforceable agreement to arbitrate under Georgia law.

The Court now turns to consideration of whether enforcement of mandatory arbitration under the facts of this case (where continued employment past a certain date is deemed to be acceptance of a mandatory arbitration provision) is contraindicated by the federal policies underlying substantive federal statutes such as Title VII and the ADEA. Initially, the Court notes that the United States Court of Appeals for the Eleventh Circuit has not addressed this precise issue. However, two United States Courts of Appeal have upheld arbitration agreements in factually analogous situations. In *May v. Higbee Co.*, 372 F.3d 757, 764-65 (5th Cir.2004), the Fifth Circuit found that the plaintiff assented to arbitration based on continuation of her employment after signing an acknowledgment form indicating receipt of an arbitration agreement that specified continued employment constituted acceptance. Thus, the plaintiff was bound to arbitrate her Title VII sexual harassment claim. *Id.* at 765. In *Tinder v. Pinkerton Security,* 305 F.3d 728, 730-34 (7th Cir.2002), where the plaintiff signed an acknowledgment form indicating receipt of an employee handbook which stated that employees would be informed of company policy changes through "payroll stuffers," the Seventh

Circuit found that the plaintiff agreed to arbitration by remaining employed following receipt of a payroll stuffer that instituted a mandatory arbitration program to be accepted through continued employment. As such, the plaintiff was compelled to arbitrate her Title VII gender discrimination and retaliation claims. *Id.* at 736.

The United States Court of Appeals for the Sixth Circuit has indicated, in dicta, that an employee's remaining at work following receipt of a dispute resolution policy that explicitly deems continued employment to constitute acceptance sufficiently binds the employee to the policy. *Lee v. Red Lobster Inns of America, Inc.*, 92 Fed.Appx. 158, 163 n. 4 (6th Cir.2004) ("The case at bar is distinguishable, of course, from cases in which employer-distributed materials told employees that their continuing to work would constitute acceptance of the employer's dispute resolution plan. In those cases, an employee's remaining at work past the effective date of the policy was properly construed as manifestation of an agreement to be bound." (citation omitted)).

The United States Court of Appeals for the Eleventh Circuit and most other circuits have held that Title VII does not prohibit employers from requiring mandatory arbitration of employment disputes as a condition of employment. *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1310 (11th Cir.2002); *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 749 (9th Cir.2003); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C.Cir.1997); see also those cases finding compulsory arbitration agreement contained in Form U-4, which must be signed in order to work as a securities broker or dealer in the United States, to be enforceable, *Desiderio v. National Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 204-06 (2d Cir.1999);

Rosenberg v. Merrill Lynch Pierce, Fenner & Smith, Inc., 170 F.3d 1, 7 (1st Cir.1999); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 365 (7th Cir.1999); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir.1991). This Court has not located any circuit court opinion rejecting mandatory arbitration of claims where acceptance of arbitration was a condition of employment.[10]

Mandatory arbitration of the specific claims brought by Plaintiffs does not offend federal policy under the FAA. *See generally Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) ("The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law. . . ."); *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 35, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (finding ADEA claims arbitrable under FAA); *Kidd v. Equitable Life Assurance Soc'y of U.S.*, 32 F.3d 516, 520 (11th Cir.1994) (finding Title VII race discrimination claim arbitrable under terms of agreement); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir.2002) (rejecting contention that FLSA inherently conflicted with FAA and holding that "FLSA claims may properly be resolved in mandatory arbitration proceedings"); *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir.1996) (finding ERISA claims arbitrable under FAA).

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[10] Prior to its decision in *Luce*, the Ninth Circuit had held that employment could not be conditioned upon an employee's acceptance of mandatory arbitration for employment-related disputes. *See Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1190 (9th Cir.1998) *overruled by E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir.2003).

For the reasons set forth above, Defendants' motions to compel arbitration are granted, and furthermore the Court grants Defendants' motions to dismiss. *See Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir.1992) ("The weight of authority clearly supports dismissal of the case when *all* of the issues raised in the district court must be submitted to arbitration.").

IV. *Conclusion*

Having granted Defendants' motions to compel arbitration and to dismiss, Plaintiffs' motions for partial summary judgment are denied as moot, Defendants' motions to strike or stay are denied as moot, and Plaintiffs' motions to compel discovery are denied as moot.

Accordingly, Defendants' motions to compel arbitration and to dismiss [*Caley*-# 3, *Jackson*-# 3] are GRANTED. The dismissal is without prejudice. Plaintiffs' motions to compel discovery [*Caley*-# 26, *Jackson*-# 23] are DENIED AS MOOT, Plaintiffs' motions for partial summary judgment [*Caley*-# 29, *Jackson*-# 26] are DENIED AS MOOT and Defendants' motions to strike or stay Plaintiffs' motions for summary judgment [*Caley*-# 33, *Jackson*-# 28] are DENIED AS MOOT.

Seventh Amendment of the United States Constitution – Trial by jury in civil cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Fair Labor Standards Act

29 U.S.C.A. § 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of *section 215* of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of *section 206* or *section 207* of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of *section 215(a)(3)* of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of *section 215(a)(3)* of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated

damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under *section 217* of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under *section 206* or *section 207* of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of *section 215(a)(3)* of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under *section 206* or *section 207* of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal

amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under *sections 206* and *207* of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in *section 255(a)* of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act

of 1947 [*29 U.S.C.A. § 251* et seq.] on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in *section 213(f)* of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in *section 206(a)(3)* of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Civil penalties for child labor violations

Any person who violates the provisions of *section 212* of this title or *section 213(c)(5)* of this title, relating to child labor, or any regulation issued under *section 212* or *section 213(c)(5)* of this title, shall be subject to a civil penalty of not to exceed $10,000 for each employee who was the subject of such a violation. Any person who repeatedly or willfully violates *section 206* or *207* of this title shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be –

(1) deducted from any sums owing by the United States to the person charged;

(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(3) ordered by the court, in an action brought for a violation of *section 215(a)(4)* of this title or a repeated

or willful violation of *section 215(a)(2)* of this title, to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with *section 554 of Title 5*, and regulations to be promulgated by the Secretary. Except for civil penalties collected for violations of *section 212* of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of *section 9a* of this title. Civil penalties collected for violations of *section 212* of this title shall be deposited in the general fund of the Treasury.

Civil Rights Act of 1991

42 U.S.C.A. § 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [*42 U.S.C.A. §§ 2000e-5* or *2000e-16*] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [*42 U.S.C.A. §§ 2000e-2, 2000e-*

3, or *2000e-16*], and provided that the complaining party cannot recover under *section 1981* of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [*42 U.S.C.A. §§ 2000e-5* or *2000e-16*] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (*42 U.S.C. 12117(a)*), and *section 794a(a)(1) of Title 29*, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under *section 791 of Title 29* and the regulations implementing *section 791 of Title 29*, or who violated the requirements of *section 791 of Title 29* or the regulations implementing *section 791 of Title 29* concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (*42 U.S.C. 12112*), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [*42 U.S.C.A. § 12112(b)(5)*] or regulations implementing *section 791 of Title 29*, damages may

not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [*42 U.S.C.A. § 2000e-5(g)*].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party –

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, *section 1981* of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section –

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means –

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (*42 U.S.C. 2000e* et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under *section 794a(a)(1) of Title 29*, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [*42 U.S.C.A. § 12111* et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

Title VII of the Civil Rights Act of 1964

42 U.S.C.A. § 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in *section 2000e-2* or *2000e-3* of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final

findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with

respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided

[1] So in original. Probably should be subsection "(b)".

that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when

the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one

hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is

necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with *rule 65 of the Federal Rules of Civil Procedure*. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of *sections 1404* and *1406 of Title 28*, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available

to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to *rule 53 of the Federal Rules of Civil Procedure*.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2) (A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of *section 2000e-3(a)* of this title.

(B) On a claim in which an individual proves a violation under *section 2000e-2(m)* of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under *section 2000e-2(m)* of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in *sections 1291* and *1292, Title 28.*

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Employment Retirement Income Security Act

29 U.S.C.A. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under *section 1109* of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) of this section or under subsection (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in *section 1169(a)(2)(A)* of this title);

(8) by the Secretary, or by an employer or other person referred to in *section 1021(f)(1)* of this title, (A) to enjoin any act or practice which violates *subsection (f) of section 1021* of this title, or (B) to

obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title[2] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under *section 401(a), 403(a),* or *405(a) of Title 26* (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if –

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by

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[2] So in original. Probably should be "subtitle".

regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce *section 1145* of this title.

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in *section 1191b(a)(1)* of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of *paragraph (1) or (4) of section 1166* of this title, *section 1021(e)(1)* or *section 1021(f)* of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it

deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under *section 1021(b)(4)* of this title. For purposes of this paragraph, an annual report that has been rejected under *section 1024(a)(4)* of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of *section 1021(d)* of this title with respect to any participant or beneficiary or who fails to meet the requirements of *section 1021(e)(2)* of this title with respect to any person or who fails to meet the requirements of *section 1082(d)(12)(E)* of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 a day for each violation by any person of *section 1082(b)(7)(F)(vi)* of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary

under regulations prescribed pursuant to *section 1021(g)* of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under *section 1024(a)(6)* of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with *section 1021(i)* of this title. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(8) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under *section 1320b-14(c)(8) of Title 42*.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary

shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in *section 1021(f)(1)* of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce *section 1145* of this title in which a judgment in favor of the plan is awarded, the court shall award the plan –

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of –

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under *section 6621 of Title 26*.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by *section 1106* of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in *section 4975(f)(4) of Title 26*) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with *section 4975(f)(5) of Title 26*) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This

subsection shall not apply to a transaction with respect to a plan described in *section 4975(e)(1) of Title 26*.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in *section 518(a) of Title 28*), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of –

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) –

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that –

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and *section 4975 of Title 26*.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of *section 1056(e)* of this title by

a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

Age Discrimination in Employment Act

29 U.S.C.A. § 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in *sections 209* and *211* of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in *sections 211(b)*, *216* (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under *section 623* of this title shall be deemed to be a prohibited act under *section 215* of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of *sections 216* and *217* of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce

this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed –

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which *section 633(b)* of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in *section 630(a)* of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F) **(i)** the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to –

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under *section 623* or *633a* of this title may not be considered knowing and voluntary unless at a minimum –

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

(3)

SUPREME COURT, U.S.
FILED
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No. 05-959

IN THE

Supreme Court of the United States

LEE CALEY, *ET AL.*,
Petitioners,

v.

GULFSTREAM AEROSPACE CORPORATION AND GENERAL DYNAMICS CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether a heightened federal "knowing and voluntary" standard rather than ordinary principles of state contract law determines the validity of an agreement, governed by the Federal Arbitration Act, that requires resolution of statutory employment claims by arbitration rather than litigation, where no federal statute provides for such a standard.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners Dianne Jackson, Willie Mae Stewart, Robert Vouk, Marlon Green, Steven Bacon, John Baker, and Lee Caley are former employees of Respondent Gulfstream Aerospace Corporation ("Gulfstream"). Petitioners William Etzel and Stanley Walker remain employees of Gulfstream.

The Respondents are Gulfstream and General Dynamics Corporation ("General Dynamics").

Pursuant to Supreme Court Rule 29.6, respondents state as follows:

Gulfstream is a wholly owned subsidiary of General Dynamics, a publicly held company. No publicly held company owns 10 percent or more of General Dynamics stock.

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STATEMENT OF THE CASE

A. Introduction

The petition for a writ of certiorari presents no issue worthy of this Court's review. The Eleventh Circuit correctly held that ordinary principles of Georgia contract law rather than any heightened federal "knowing and voluntary" waiver standard should determine the enforceability of arbitration agreements subject to the Federal Arbitration Act ("FAA") where no federal substantive statute – indeed, no federal statute at all – requires application of such a heightened federal standard. In so doing, the court of appeals gave effect to this Court's repeated observation that Congress sought in the FAA to "reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001).

Although petitioners assert that the Eleventh Circuit's decision implicates a "well-established . . . and widely-recognized conflict," Pet. at 9, that assertion is dramatically overblown. The overwhelming majority of the Circuits to have considered the question have correctly concluded, as the Eleventh Circuit did here, that federal law does not impose any heightened "knowing and voluntary" waiver standard. The remaining Circuits cited by petitioners – the Sixth Circuit and the Ninth Circuit – do not have settled law on the question, nor has a heightened federal waiver standard been necessary to the outcome of any Circuit case. Because there is no ripe circuit conflict at this point, and because respondents would prevail even under petitioners' standard, there is no reason for this Court to grant certiorari now to consider the question presented in the petition.

B. Factual Background

In 2002, Gulfstream, a wholly-owned subsidiary of General Dynamics headquartered in Savannah, Georgia, adopted a Dispute Resolution Policy ("DRP") as the exclusive method for resolving certain employment-related disputes between the company and its employees. Gulfstream updated the DRP in April 2003. Both the initial DRP and the updated version provide that binding arbitration rather than litigation will be the final step in the dispute resolution process.

Before implementing the DRP and its update a year later, Gulfstream took multiple steps to notify its employees both that continued employment would render the DRP a binding contract and that the DRP required that employment disputes be arbitrated.

Gulfstream mailed to each employee, petitioners included, a complete hard copy of the relevant DRP, accompanied by a cover letter and a question and answer sheet. Information about the DRP was also posted on bulletin boards used to publish information to employees and was communicated through Gulfstream's intranet, which was commonly used to distribute information to employees and which served as a reference for Gulfstream's policies and procedures.

As the court of appeals observed, the DRP and the cover letter "clearly announced that the DRP was a contract, that 'acceptance of employment or the continuation of employment by an individual shall be deemed to be acceptance of the DRP,' that no signature would be required for the policy to be applicable, and that the policy would be a condition of continued employment." Pet. App. 24a-25a. The cover letter accompanying the initial DRP, for example, stated:

> The DRP will become the *exclusive procedure to resolve covered workplace disputes* – so you should carefully read the enclosed brochure. This policy, which will become effective on August 1, 2002, will be a *condition of continued employment*. All covered claims will be subject to this DRP at that time.

Pet. App. 3a (emphasis added). Similarly, the cover letter accompanying the April 1, 2003 DRP explained that Gulfstream had previously implemented the DRP to provide for the resolution of workplace disputes and that the program was being revised. *See* Affidavit of Michael Patton, Attachment 1 (attached as Exhibit 6 to Def.'s Mot. & Mem. to Compel Arbitration and Dismiss Action (N.D. Ga. filed Feb. 2, 2004)). Substantive revisions were highlighted, and employees were urged to "read closely" the enclosed revised DRP. *Id.*

The terms of the DRP – which the district court described as "possess[ing] clarity" and "unburdened with excessively confusing or unnecessary verbiage," Pet. App. 50a – confirmed the DRP's status as a contract and made clear that an employee's continuation of employment constituted acceptance of its terms and conditions:

> *Acceptance/No Change in Terms of Employment*
>
> The . . . continuation of employment by an individual shall be deemed to be acceptance of the DRP. No signature shall be required for the policy to be applicable. The mutual obligations set forth in this DRP shall constitute a contract between the Employee and the Company but shall not change an Employee's at-will relationship or any term of any other contract or agreement between the Company and Employee. This Policy shall constitute the entire

> agreement between the Employee and Company for the resolution of Covered Claims.

Pet. App. 4a.

The DRP also made clear that arbitration was the sole available procedure for resolving the types of employment-related disputes specified in the DRP, including those arising under federal statutes. The DRP provides, for example, that it is "the sole and exclusive forum and remedy for all Covered Claims," and that "[t]he Employee and Company agree and hereby waive any right to jury trial for any Covered Claim." Pet. App. 6a-7a.

The DRP outlines, in plain language, a fair and impartial procedure for resolving certain employment-related disputes through a four-step dispute resolution process not previously available to Gulfstream's at-will employees:

> *Level 1 – Human Resources Review* – Human Resources meets informally with the Employee and the other parties involved and attempts to resolve the Employee's disputes. . . .
>
> *Level 2 – Management Panel Review* – The Employee and [a] Management Panel meet to resolve the dispute. . . .
>
> *Level 3 – Mediation* – An outside mediator helps the Employee and the Company negotiate a mutually acceptable resolution. . . .
>
> *Level 4 – Arbitration* – An outside arbitrator provides the Employee and the Company with a decision on the . . . Claim. . . .

(4/10/03 DRP at 1-2). Both Gulfstream and its employees are required to arbitrate disputes as the final step of the DRP.

(4/10/03 DRP at 1-3).[1] Gulfstream cannot change the DRP midstream and decide instead to litigate a claim. It must provide at least thirty days written notice of any modification to all employees. Once a claim has been filed, moreover, Gulfstream cannot unilaterally change the procedures applicable to that claim. (4/10/03 DRP at 4).

The DRP does not restrict an employee's substantive rights under any law or statute, but instead merely transfers the forum for vindication of those rights from the courtroom to the arbitral forum. (4/10/03 DRP at 10). While employees are required to arbitrate rather than litigate, the DRP does not prevent them from filing complaints with governmental agencies.[2] Contrary to petitioners' contention, the DRP does not shorten any statutory or other limitations periods for filing claims. (4/10/03 DRP at 2-3). Once a claim has been filed, however, the DRP requires the claimant to pursue it diligently, waiting no longer than thirty days before proceeding to the next level.

Further, the DRP ensures that employees have the opportunity for assistance of counsel during mediation and arbitration. The DRP allows for discovery, including depositions, production of documents, disclosure of witnesses and documents that each party intends to utilize at

---

[1] Although Gulfstream or its employees may each seek immediate injunctive relief for claims related to restrictive covenants and other generally protected business information, final resolution remains pursuant to arbitration. (4/10/03 DRP at 2). No such claim is at issue here.

[2] Nothing in the DRP, for example, prohibits an employee from filing a charge with the Equal Employment Opportunity Commission ("EEOC") or the Department of Labor ("DOL"). And of course the EEOC, DOL, or any other agency may still investigate and pursue claims against Gulfstream.

the arbitration hearing, subpoenas, protective orders, and resolution of discovery disputes. (4/10/03 DRP at 8-9). Damages are not circumscribed: "[t]he Arbitrator . . . may grant any remedy or relief that would have been available to an individual Employee had the claim been asserted in court . . . ." (4/10/03 DRP at 9). Except for a $100 filing fee for arbitration and the employee's fees for his own experts and attorneys, Gulfstream pays for the costs of arbitration, including the arbitrator's fee and reasonable travel expenses, the cost of renting a hearing room, and the employee's salary, if still employed, for time spent at the arbitration (for up to seven days). Even then, an arbitrator may award experts' and attorneys' fees to the employee. (4/10/03 DRP at 10). The DRP requires the arbitrator to issue a written opinion (4/10/03 DRP at 9), and retaliation against employees who initiate proceedings under the DRP is strictly prohibited. (4/10/03 DRP at 3).

C. Proceedings Below

Petitioners are employees and former employees of Gulfstream who had employment-related grievances and were subject to the arbitration provisions of the DRP. All petitioners were employed both when Gulfstream distributed notice of the DRP and on its effective date, and none denies receiving notice of the DRP and its terms. *See* Pet. App. 3a n.1 (noting that "[t]he district court found that each of the plaintiffs had sufficient notice of the DRP" and observing that plaintiffs "do not challenge the district court's conclusion that each of the plaintiffs had sufficient notice of the DRP").[3]

---

[3] Some petitioners questioned whether they received either the August 2002 or the April 2003 DRP, but none denied receiving at least one DRP.

Rather than arbitrating their grievances, however, petitioners filed suit alleging claims under the Age Discrimination in Employment Act ("ADEA"), the Fair Labor Standards Act ("FLSA"), the Employee Retirement Income Security Act ("ERISA"), and Title VII. After petitioners refused repeated demands to arbitrate, respondents filed motions to compel arbitration and to dismiss the actions, which petitioners opposed.

Recognizing that the "sole contested issue before [it] is whether the DRP constitutes a valid, written agreement to arbitrate between the parties," Pet. App. 42a, the district court found that the DRP constituted such a binding contract because it met all of the relevant requirements under Georgia law, *id.* at 44a-49a, and was not unconscionable under state law, *id.* at 50a-51a.

The district court also rejected petitioners' claim that a separate federal law requirement of a "knowing and voluntary" waiver of petitioners' procedural rights to a jury trial applied to the agreement to arbitrate. The court held that imposing such a standard "flies in the face of both the explicit wording of the FAA . . . and United States Supreme Court precedent," Pet. App. 43a n.6, and is not required by any of the "underlying substantive federal statutes such as Title VII and the ADEA," *id.* at 51a. The district court thus granted respondents' motions to compel arbitration. *Id.* at 51a-54a.

The Eleventh Circuit unanimously affirmed, holding that the DRP constituted a valid and enforceable agreement to arbitrate under the FAA. The Eleventh Circuit agreed with the district court that the DRP was a binding and enforceable contract between petitioners and Gulfstream "under ordinary Georgia contract law." Pet. App. 21a; *see also id.* at 22a-33a (applying Georgia law).

The Eleventh Circuit, like the district court, also rejected plaintiffs' arguments and held that "the DRP's agreement to arbitrate and waiver of jury trial rights are governed by contract principles and are not subject to the heightened knowing and voluntary standard argued by plaintiffs." Pet. App. 17a. Citing both the FAA and precedent from this Court, the court of appeals noted that arbitration agreements governed by the FAA are "'valid, irrevocable, and enforceable,'" unless generally applicable principles of contract law permit revocation. Pet. App. 17a (quoting 9 U.S.C. § 2). The court of appeals rejected the notion that plaintiffs' pursuit of federal statutory claims requires a different result, because, "as the Supreme Court has recognized, a party agreeing to arbitration does not waive any substantive statutory rights; rather, the party simply agrees to submit those rights to an arbitral forum." *Id.* at 17a-18a.

Nor did plaintiffs' efforts to cloak their arguments in constitutional garb change the analysis, because the Seventh Amendment "does not confer the right to a trial, but only the right to have a jury hear the case *once it is determined that the litigation should proceed before a court*," and, therefore, the "jury trial right vanishes" when the arbitral forum is properly invoked. Pet. App. 18a (internal quotation marks omitted; emphasis in original). Moreover, any such heightened standard would be entirely at odds with "the FAA's plain language," which makes "clear that arbitration agreements are enforceable except for state-law grounds for ordinary revocation." *Id.* at 19a.

The Eleventh Circuit recognized, moreover, that plaintiffs' arguments concerning a heightened standard were largely beside the point, because "plaintiffs' acceptance of the DRP probably would satisfy even a heightened 'knowing and voluntary' standard in any event." Pet. App. 20a n.13.

REASONS FOR DENYING THE WRIT

The FAA provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA "manifest[s] a 'liberal federal policy favoring arbitration agreements,'" *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), and requires federal courts to "'rigorously enforce'" such agreements. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). To implement this federal policy, the Court has instructed that "[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1209 (2006) ("§ 2 [contains] the FAA's substantive command that arbitration agreements be treated like all other contracts.").

Consistent with the text of the FAA and this Court's decisions interpreting it, the Eleventh Circuit applied ordinary principles of Georgia contract law to determine the enforceability of the arbitration provisions contained in Gulfstream's DRP, and it expressly rejected petitioners' argument that federal law requires that employers meet an additional "knowing and voluntary" waiver standard before a federal court can enforce an agreement that requires employees to arbitrate, rather than litigate, their federal statutory claims.

Petitioners do not contest that their substantive federal statutory claims may be the subject of an agreement to arbitrate, enforceable pursuant to the FAA. *See, e.g., Circuit City*, 532 U.S. at 111; *Gilmer*, 500 U.S. at 26; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985). Nor do they contend that the text of any particular substantive statute (such as Title VII or the ADEA) manifests a congressional intent to create a more demanding standard for reviewing the enforceability of an arbitration agreement governing such claims. Instead, they contend that there is a split among the courts of appeals regarding the existence of a heightened federal waiver standard that may preclude enforcement of an agreement to arbitrate employment claims even where (as here) the agreement is enforceable as a matter of state law. As will be shown, petitioners' contentions reflect gross exaggerations.

A. No Ripe Conflict Exists.

1. Most Circuits Have Correctly Rejected A Federal "Knowing and Voluntary" Waiver Standard.

The large majority of Circuits to have considered the question – like the Eleventh Circuit below – have squarely rejected the "knowing and voluntary" waiver standard petitioners advance, and instead apply ordinary principles of state contract law to arbitration agreements governing employment-related claims. *See, e.g., Seus v. John Nuveen & Co.*, 146 F.3d 175, 184 (3d Cir. 1998) ("Nothing short of a showing of fraud, duress, mistake or some other ground recognized by the law applicable to contracts generally would have excused the district court from enforcing [plaintiff's] agreement [to arbitrate]."); *Sydnor v. Conseco Financial Servicing Corp.*, 252 F.3d 302, 305-07 (4th Cir. 2001) (applying "elementary principle[s] of contract law" and rejecting plaintiff's suggestion that a "more demanding

standard" is appropriate in determining the enforceability of the arbitration agreement); *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002) (outside the context of a collective bargaining agreement, no heightened standard applies to the enforceability of an agreement to arbitrate); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 366-67 (7th Cir. 1999) ("An agreement to arbitrate is treated like any other contract: 'In determining whether a valid agreement arose between the parties, a federal court should look to the state law that ordinarily governs the formation of contracts.'"); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1052 (8th Cir. 2004) ("Whether an arbitration agreement is valid is a matter of state contract law."); *see also* Pet. App. 20a-21a & n.14 (citing cases).

This position is plainly correct. Imposition of a heightened federal "knowing and voluntary" standard to supplement whatever level of knowledge and voluntariness is required by state contract law is irreconcilable with the FAA and this Court's decisions interpreting it. *See, e.g., Seus*, 146 F.3d at 183-84 (holding that applying a heightened knowing-and-voluntary standard to arbitration agreements would be inconsistent with the FAA and *Gilmer*); *American Heritage Life Ins.*, 294 F.3d at 711; *Sydnor*, 252 F.3d at 307; *cf. Williams v. Imhoff*, 203 F.3d 758, 764 (10th Cir. 2000) (rejecting application of "clear and unmistakable" waiver standard).

The FAA was enacted precisely for the purpose of "plac[ing] arbitration agreements upon the same footing as other contracts." *Gilmer*, 500 U.S. at 24. As the text of the FAA makes manifest, an agreement to arbitrate in lieu of litigation is "valid [and] irrevocable . . . save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also Buckeye Check Cashing*, 126 S. Ct. at 1209. "Of course, courts should remain attuned

to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Mitsubishi*, 473 U.S. at 627 (citation omitted). Absent such generally applicable contract law claims, however, the FAA "'provides no basis for disfavoring agreements to arbitrate statutory claims.'" *McMahon*, 482 U.S. at 226 (quoting *Mitsubishi*, 473 U.S. at 627).

And, as this Court has repeatedly emphasized, the fact that arbitration agreements foreclose access to a judicial forum does not warrant application of a heightened standard. This Court stated in *Gilmer*, for example, that "[s]uch generalized attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" *Gilmer*, 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989); second alteration in original). In carving out a heightened standard for requirements to arbitrate *contained in collective bargaining agreements* not governed by the FAA, moreover, *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), made clear that *Gilmer* had proscribed such a heightened standard in the context of an individual waiving his own statutory rights to a judicial forum. *See id.* at 80-81; *see also id.* at 78 n.1 (declining to consider applicability of FAA to the collective bargaining agreement before it).[4]

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[4] *Wright* explained that a "clear and unmistakable" standard was applicable to requirements to arbitrate contained in a collective bargaining agreement because, in that context, the union waives the rights of others, i.e., the rights of represented employees. *Wright*, 525 U.S. at 80-81. *Wright* cautioned that such a standard

Indeed, imposing a federal "knowing and voluntary" overlay on state contract law would make a mockery of this Court's instruction that "[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc.*, 514 U.S. at 944.

Nor is this result inconsistent with the Seventh Amendment:

> [t]he Seventh Amendment confers not the right to a jury trial *per se*, but rather "only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes."

Cooper v. MRM Invs. Co., 367 F.3d 493, 506 (6th Cir. 2004) (citation omitted). In *Cooper*, the Sixth Circuit noted that, "[o]f the Circuits to squarely address the [Seventh Amendment] issue, all four share [this] view . . . ." *Id.* at 506 n.5 (citing *Melton v. Philip Morris Inc.*, 71 Fed. Appx. 701, 703 (9th Cir. 2003); *Am. Heritage*, 294 F.3d at 710-11; *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Koveleskie v. SBC Capital Markets*, 167 F.3d 361, 368 (7th Cir. 1999)); *see also* Pet. App. 18a (holding the same and collecting cases); *cf. EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 750 (9th Cir. 2003) (en banc) ("[W]e now join several other Circuits in concluding, pursuant to *Gilmer*, that the right to jury trial presents no bar to compulsory arbitration.").[5]

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does *not* apply to "an individual's waiver of his own rights" to a judicial forum, which is controlled by *Gilmer*. *Id.*

[5] Petitioners never identify the source of their purported federal "knowing and voluntary" standard. Clearly, such a heightened

2. No Circuit Has Squarely Adopted A Heightened "Knowing and Voluntary" Waiver Standard.

Seeking to manufacture a basis for granting certiorari, petitioners have gone to great lengths to contend that several other Circuits depart from this majority rule. That effort fails.

Petitioners are simply incorrect that the law of the Second, Tenth, and D.C. Circuits conflicts with the majority rule applied by the Eleventh Circuit in this case. The cases from the Second Circuit and the Tenth Circuit that petitioners cite do not address the validity of an arbitration agreement under the FAA at all, but rather consider the waiver of a right to a jury trial where the proceedings that replace it are in fact judicial (and, therefore, implicate the Seventh Amendment right), *see, e.g., National Equip. Rental, Ltd. v. Hendrix*, 565

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standard applicable only to arbitration agreements cannot emanate from the FAA. *See, e.g., Gilmer*, 500 U.S. at 32-33. And because they attempt to cast their heightened standard over claims arising under the ADEA, the FLSA, ERISA, and Title VII, the argument appears to preclude reliance on any particular statute other than the FAA. (If petitioners do purport to locate the heightened standard in another federal statute, they have failed to even identify such a statute, let alone probe its text, purpose, and legislative history to arrive at the heightened requirement. *See Gilmer*, 500 U.S. at 26.) Nor can petitioners derive their standard from the U.S. Constitution as no constitutional rights are even at issue. *See Wright*, 525 U.S. at 80-82 & n.2 (identifying right to judicial forum as a "statutory right"); *see also Cooper*, 367 F.3d at 506 (holding that the Seventh Amendment is inapplicable to agreements to arbitrate in lieu of litigation and collecting cases). Finally, to the extent petitioners rely on the standard applicable to waiver of *substantive* rights, this Court has already foreclosed the argument. *See Gilmer*, 500 U.S. at 26; *Mitsubishi*, 473 U.S. at 628.

F.2d 255 (2d Cir. 1997); *Hulsey v. West*, 966 F.2d 579 (10th Cir. 1992), *cited at* Pet. 15-16. These cases are thus irrelevant and certainly do not establish a circuit conflict.[6]

The same is true of petitioners' citation to the D.C. Circuit's decision in *Bailey v. Federal National Mortgage Ass'n*, 209 F.3d 740 (D.C. Cir. 2000), *cited at* Pet. 20-21. In *Bailey*, the D.C. Circuit adopted the "knowing and voluntary" standard as a matter of local District of Columbia law, not as a matter of general federal law. *See* 209 F.3d at 747 (refusing to compel arbitration "[i]n light of the undisputed facts in this case and the applicable law of the District of Columbia"). Thus, D.C. Circuit law is not even arguably in conflict either.

Nor is the Eleventh Circuit's decision in this case in conflict with the law of the Sixth and Ninth Circuits, the two Circuits to which petitioners devote substantial attention. The law of the Sixth Circuit is unsettled on the question whether a heightened federal "knowing and voluntary" waiver standard applies. There appears to be an intracircuit conflict as to whether such a rule should apply, and no decision has actually applied a heightened federal standard in an outcome-determinative manner. In *Walker v. Ryan's*

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[6] Indeed, relevant case law from the these Circuits is entirely consistent with the holding of the Eleventh Circuit here. *See Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 149 (2d Cir.) ("Whether one can be bound by an arbitration clause is usually determined by looking at generally accepted principles of contract law. Under such principles, in the absence of fraud or other wrongful act on the part of another contracting party, a party 'who signs or accepts a written contract . . . is conclusively presumed to know its contents and to assent to them . . . .'") (internal citations omitted; ellipsis in original), *cert. denied*, 543 U.S. 874 (2004); *Imhoff*, 203 F.3d at 764 (rejecting employees' argument for applying a heightened "clear and unmistakable" standard).

Family Steak Houses, Inc., 400 F.3d 370 (6th Cir.), *cert. denied*, 126 S. Ct. 730 (2005) – a case on which this Court recently denied certiorari notwithstanding that the petition for certiorari alleged the same purported circuit conflict petitioners allege here – a Sixth Circuit panel invoked the heightened knowing and voluntary standard, 400 F.3d at 381, although even in *Walker* the panel stated its conclusion in terms of state law, *see id.* at 376 ("we hold that the district [court] correctly refused to enforce Plaintiffs' arbitration agreements as unenforceable under Tennessee law"). In contrast, the panel in *Cooper v. MRM Investment Co.*, 367 F.3d 493 (6th Cir. 2004), disputed whether the law of the Sixth Circuit imposed a heightened federal waiver standard. *Id.* at 507-08. Moreover, the *Cooper* panel held that *even if* a knowing and voluntary waiver of jury trial rights were required, it would necessarily be met *whenever* a party entered an agreement to arbitrate, because "a party who enters an arbitration agreement necessarily consents to the clear and obvious consequence: the surrender of his right to go to trial." *Id.* at 508 (citing *Burden v. Check Into Cash Kentucky, LLC*, 267 F.3d 483, 492 (6th Cir. 2001)).

These two Sixth Circuit panels diverged in their interpretation of the Circuit's en banc decision in *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (en banc). That decision provides tenuous support at best for the proposition that a heightened federal "knowing and voluntary" waiver standard applies as a matter of Sixth Circuit law. The discussion cited by petitioners (and by *Walker*) amounts to nothing more than a few sentences contained in a section of the opinion that expressly addresses "arguments that [the employee] raises with respect to the formation of the contract *under state law*." 317 F.3d at 666 (emphasis added); *id.* at 668 (applying "ordinary contract principles, remaining alert to ensure that employers do not defeat the policies of . . . Title VII by taking advantage of

their superior bargaining position or overreaching") (internal quotation marks omitted). That is why the panel in *Cooper* did not read *Morrison* as imposing a federal "knowing and voluntary" waiver standard. *See Cooper*, 367 F.3d at 507 (characterizing the Sixth Circuit's earlier "seeming endorsement of the knowing and voluntary standard [as] *dictum*" and noting the absence of en banc resolution of the issue).[7]

Moreover, the supposed "knowing and voluntary" waiver standard has *never* determined the outcome of a Sixth Circuit arbitration case. In *Walker*, the court's holding that the agreement to arbitrate was not enforceable expressly relied on independent grounds of Tennessee contract law, including that the employer "has not provided adequate consideration," 400 F.3d at 379, and that the arbitration agreement "did not result from a meeting of the minds in mutual assent," *id.* at 383. In *Morrison*, the court concluded that the agreement *was* enforceable (save its cost-splitting provisions, which were severed). *See Morrison*, 317 F.3d at 666. And *Cooper*, too, held that the arbitration agreement was enforceable, concluding that any knowing and voluntary standard would be inconsequential because "a party who enters an arbitration agreement necessarily consents to the clear and obvious

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[7] An examination of *Morrison* makes clear that the reference to a knowing and voluntary standard was in any event misguided. The case on which *Morrison* relied – *Adams v. Philip Morris, Inc.*, 67 F.3d 580 (6th Cir. 1995), *cited in Morrison*, 317 F.3d at 668 – applied the knowing and voluntary test to an agreement waiving *the substantive claims themselves*, not to an agreement that merely designated arbitration rather than litigation as the appropriate forum for resolving those claims. As this Court has repeatedly stated, "'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

consequence: the surrender of his right to go to trial." *Cooper*, 367 F.3d at 508.[8] Thus, it is not clear that the "knowing and voluntary" standard is of any consequence even in the Sixth Circuit. Respondents have found no case (and petitioners do not cite one) in which the knowing and voluntary standard was dispositive in a Sixth Circuit refusal to enforce an arbitration agreement.

Because the Sixth Circuit does not have a settled rule requiring a heightened federal "knowing and voluntary" standard, the Eleventh Circuit's decision in this case cannot fairly be said to conflict with any rule of Sixth Circuit law. It would therefore be premature for this Court to grant certiorari now to consider the question – particularly given that the Eleventh Circuit's adoption of the majority rule rejecting such a standard is plainly the correct substantive outcome. If the Sixth Circuit ever settles the question definitively and applies a heightened federal standard to invalidate an arbitration agreement, the Court can consider the question at that point.

Moreover, the instant case would be an exceptionally poor vehicle for resolving any purported conflict with the Sixth Circuit. There is no case suggesting that the Sixth Circuit would have reached a different result on the facts presented here. Indeed, the Eleventh Circuit expressly suggested to the contrary, concluding that "the plaintiffs' acceptance of the DRP probably would satisfy even a heightened 'knowing and voluntary' standard in any event." Pet. App. 20a n.13 (citing *Cooper*, 367 F.3d at 506). That is because the DRP "expressly stated that the employee and Gulfstream both waived the right to a jury trial regarding

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[8] The Sixth Circuit in *Cooper* remanded for the district court to consider only "whether the likely costs of arbitration are so high that they will deter Cooper or similarly situated employees from exercising their right to arbitrate." 367 F.3d at 513.

covered claims and explained in detail the mandatory dispute resolution process." *Id.* Nothing more would be required even under the erroneous heightened standard petitioners urge. Thus, even if the Sixth Circuit had adopted a heightened "knowing and voluntary" standard, the Eleventh Circuit's decision in this case would not present a true conflict.

Petitioners' claim that Ninth Circuit law conflicts with the majority rule is even weaker. The cases petitioners invoke – most notably, *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994) – are no longer reflective of that Circuit's approach to determining the enforceability of arbitration agreements. In the 1990's, in two separate opinions, the Ninth Circuit held that, under the 1991 Civil Rights Act, waiver of rights to a judicial forum must be "knowing" (*Lai*) and "voluntary," *i.e.*, not compulsory (*Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998)). Both *Lai* and *Duffield* held that congressional intent to create a heightened standard for waiving rights to a judicial forum "is apparent from the text and legislative history of Title VII," a conclusion "reinforced" by the Civil Rights Act of 1991. *Lai*, 42 F.3d at 1304; *see also Duffield*, 144 F.3d at 1189-90. *Duffield* expressly followed *Lai* in construing the purpose of the 1991 Act as "uniformly to *expand* employees' rights and 'to *increase* the possible remedies available to civil rights plaintiffs.'" *Duffield*, 144 F.3d at 1192 (quoting *Lai*, 42 F.3d at 1304) (emphasis in original). And both *Lai* and *Duffield* reflected a hostility to – or, at minimum, a skepticism of – arbitration and the adequacy of the arbitral forum. *See, e.g., Lai*, 42 F.3d at 1305 ("the remedies and procedural protections available in the arbitral forum can differ significantly from those contemplated by the legislature [that enacted the 1991 Act]").

The Ninth Circuit has since revisited *Duffield* en banc, *see EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc), and expressly overruled the decision on the ground that "[t]he presumption in *Duffield* . . . that allowing compulsory arbitration weakens the 1991 Act is inconsistent with the Supreme Court's endorsement of arbitration." *Luce, Forward*, 345 F.3d at 750; *see also id.* ("[T]he view that compulsory arbitration weakens Title VII conflicts with the Supreme Court's stated position that arbitration affects only the choice of forum, not substantive rights."). Although *Luce, Forward* did not also explicitly reverse *Lai*, the logic of *Luce, Forward* destroys *Lai*'s foundation, and, indeed, no published opinion has applied *Lai*'s knowing standard since. *See, e.g., Ingle v. Circuit City*, 408 F.3d 592, 595 (9th Cir. 2005) (applying ordinary principles of contract law).

Thus, there is no reason to think that the Ninth Circuit would apply even a heightened "knowledge" standard in the future, much less the "knowing and voluntary" waiver standard petitioners urge. Consequently, there is no reason for this Court to grant certiorari now to consider the question. If the Ninth Circuit continues to adhere to *Lai*'s heightened knowledge requirement in a case in which that requirement determines the outcome, this Court can grant certiorari at that point.

In any event, as with the Sixth Circuit's "knowing and voluntary" standard, application of *Lai*'s "knowing" waiver standard would not produce a different result here. *See* Pet. App. at 20a n.13. Contrary to petitioners' assertion that such a standard would require *actual* knowledge, *see* Pet. at 11, the pre-*Luce* Ninth Circuit case law made clear that "knowing" agreement merely required that the employee be given the necessary information – *i.e.*, that she was entering a binding agreement to arbitrate employment-related claims.

Meeting that standard did *not* require actual knowledge. *See, e.g., Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1156 (9th Cir. 1998); *cf. Lai*, 42 F.3d at 1305 (holding that there was no "knowing" waiver when employees "could not have understood that in signing [the form], they were agreeing to arbitrate sexual discrimination suits"). Here, the district court found (and petitioners do not dispute) that the DRP and its accompanying materials made manifest that, by continuing their employment, petitioners agreed to bring certain employment claims solely in the arbitral forum, and that they waived the right to any other forum, including the right to a jury trial. *See* Pet. App. 40a, 50a. Because any waiver in the present case would be deemed "knowing" under the standard in *Lai*, this case would not present a true conflict even if the Ninth Circuit continued to adhere to *Lai*.

B. This Case Does Not Present Any Question Regarding The Applicability Of The First Circuit's Standard Articulated In *Rosenberg*.

Nor is there any basis for petitioners' contention that certiorari should be granted to resolve a purported inconsistency between the Eleventh Circuit's decision in this case and the so-called "appropriateness" test created by the First Circuit, which purports to rely on language in the 1991 Civil Rights Act to limit enforcement of arbitration agreements when it would not be "appropriate" to arbitrate. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999), *cited at* Pet. 17. To the contrary, petitioners' invocation of *Rosenberg* is a red herring.[9]

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[9] *Rosenberg* grounded its holding solely on the 1991 Civil Rights Act, which states that "where appropriate and to the extent authorized by law . . . arbitration . . . is encouraged to resolve disputes arising under [these laws]." Civil Rights Act of 1991,

First, as petitioners themselves concede, *Rosenberg* provides no support at all for the standard petitioners advance. In *Rosenberg*, the First Circuit expressly *declined* to resolve the question whether a heightened knowing and voluntary standard applies to agreements to arbitrate. *See* 170 F.3d at 18. Thus, there is no conflict with the Eleventh Circuit on the question presented in the petition.

Second, *Rosenberg* deals with an issue – notice – that is not implicated by the facts of this case. *See id.* at 21 (holding that the 1991 Civil Rights Act requires "some minimal level of notice to the employee that statutory claims are subject to arbitration"); *see also Campbell v. General Dynamics Gov't Sys. Corp.*, 407 F.3d 546 (1st Cir. 2005). The *Rosenberg* court determined that compelling arbitration would be inappropriate under the circumstances of that case, because the agreement had failed to provide the employee with notice that her statutory claims would be subject to arbitration. *See* 170 F.3d at 17-18. *Rosenberg* expressly distinguished the facts before it from circumstances such as those present here, stating:

> If Merrill Lynch had provided the rules to Rosenberg but she did not read them, that would not save her. . . . *This opinion also does not suggest utilization of a subjective standard which focuses on what the employee actually knew.* . . . Indeed, it would be an odd result if the 1991 [Act] were to be interpreted based on the assumption that women and minorities, otherwise competent to enter contracts, were somehow disabled and in need of such special

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Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081. The decision carefully distinguishes the appropriateness requirement that it finds in the 1991 Act from any generally applicable concerns under the FAA or common law. *See* 170 F.3d at 19 ("appropriateness" was not a concern that emanated from the FAA or common law).

> protections where the subject of the contract was an agreement to arbitrate.

Id. at 21 n.17 (emphasis added).

Thus, the Eleventh Circuit properly concluded that, even if the "appropriateness" test were somehow relevant to the instant inquiry – and it is not – that would not change the outcome of this case. *See* Pet. App. 26a-27a n.18 (distinguishing the First Circuit cases and emphasizing that "Gulfstream's DRP did provide extensive details regarding its arbitration policy"); *see also* Pet. App. at 45a-48a (district court decision) (discussing evidence demonstrating that petitioners had notice of the DRP).[10]

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[10] As the Eleventh Circuit correctly recognized, nothing in its opinion conflicts with the First Circuit's decision in *Campbell*, in which the First Circuit determined that, under the particular circumstances before it, the mass e-mail sent by a General Dynamics subsidiary heralding its newly adopted arbitration policy was insufficient to provide a "reasonably prudent employee notice of the waiver," where, among other things, the text of the e-mail "undersold the significance of the Policy and omitted the critical fact that it contained a mandatory arbitration agreement." 407 F.3d at 555, 558.

In sharp contrast, the district court in this case expressly found that "Plaintiffs had notice of the mandatory arbitration provision of the DRP such that their continued employment served as acceptance thereof." Pet. App. 45a. Notably, respondents here did not rely simply on a mass e-mail, but instead (as the district court expressly noted) mailed hard copies of the DRP and its explanatory documents to each plaintiff's address, posted notices on bulletin boards throughout the Gulfstream facility, and posted the DRP and accompanying documents on the company intranet. *See id.* at 46a-49a.

C. The Remaining Circuit Conflicts That Petitioners Allege Are Not Presented In This Case.

In a final desperate attempt to buttress their argument for certiorari, petitioners go on at length about alleged circuit splits pertaining to two additional questions – whether state law may impose a "knowing and voluntary" waiver standard, and whether the plaintiff or defendant bears the burden of proof when such a standard is imposed, *see* Pet. at 22-28. Neither of these alleged conflicts is even remotely presented by this case. Thus, petitioners' invocation of this case law is entirely beside the point.

Petitioners do not contend that Georgia law imposes a "knowing and voluntary" waiver standard. (Precisely for this reason, petitioners purport to find such a standard *under federal law*.) And, because the Eleventh Circuit correctly concluded that neither federal nor Georgia law holds an agreement to resolve claims in an arbitral rather than judicial forum to any such heightened standard, the court had no occasion to consider which party would bear the burden of proof if such a standard were to apply.

Indeed, what appears to be driving the petition for certiorari is dissatisfaction with Georgia contract law as correctly applied by the Eleventh Circuit. Petitioners decry the differences between Georgia and California contract law. *See* Pet. 18-20 n.29. There is no reason to think, however, that the agreement at issue here would be invalid under California law. And regardless, by placing arbitration agreements on equal footing with other contracts and providing that such agreements are governed by state law, the FAA clearly contemplates that an arbitration agreement enforceable in one State may not be enforceable in another. *See, e.g.*, *Gilmer*, 500 U.S. at 32-33. It therefore would make no difference if an arbitration agreement formed in one State (and governed by that State's law) would not be enforceable,

while the same agreement formed in another State (and governed by that State's law) would be deemed valid. This is to be expected in a federal system.

There is no dispute here, moreover, that *Georgia* contract law recognizes as valid and binding petitioners' acceptance of the DRP at issue in this case. Finding no support in the relevant state law, petitioners request this Court to displace Georgia contract law by creating a heightened federal standard that has no justification in the text of the FAA or precedent interpreting it.

Thus, the only justification for a heightened standard – and the one that animates the petition here – is precisely the hostility to arbitration and suspicion of the arbitral forum that Congress intended to eliminate through adoption of the FAA and that this Court has repeatedly condemned. *See, e.g., Gilmer*, 500 U.S. at 24-25; *Circuit City Stores*, 532 U.S. at 111; *Shearson/American Express*, 482 U.S. at 226.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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LEE CALEY, *et al.*,

Petitioners,

v.

GULFSTREAM AEROSPACE CORPORATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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I. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR DECIDING THE QUESTION PRESENTED

The Question Presented – whether waivers of procedural rights under federal employment laws must be knowing and voluntary – is squarely posed by this case. That question was expressly decided both by the district court (Pet. App. 43 n.6, 50) and by the court of appeals (Pet. App. 17-20, 21 n.14). The relevant facts are not in dispute.

If such waivers must be voluntary, the decision of the court of appeals would necessarily have to be reversed. The express purpose and undisputed effect of Gulfstream's actions was to compel its employees to give up their procedural rights under federal law in order to avoid forfeiting their jobs. The district court correctly described the loss of those rights as having been "required" by Gulfstream. (Pet. App. 52). Short of measures that would ordinarily constitute serious crimes, it would be difficult to construct a scheme more coercive than that utilized by Gulfstream in this case.

If such waivers must be knowing, the decision of the court of appeals also must be reserved. The issue is not, as respondents at times suggest, whether a person who knows that a claim is to go to arbitration would realize that meant there would be no court trial or jury.[1] The dispute here concerns the interpretation of Georgia law accepted by the courts below, under which only two events were required to *create* an arbitration contract that stripped workers of most of their procedural rights under federal employment law: receipt of an envelope containing

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[1] Respondents repeatedly refer to a footnote in the court of appeals' decision suggesting that the "knowing and voluntary" requirement was satisfied. (R.Br. 8, 18-19, 20). The passage referred to, however, concerns whether an employee who read the DRP, understood that it was an offer to contract, and decided to accept that offer, would have realized that he or she was giving up the right to a jury trial. App. 20 n.13.

the DRP, and going to work on August 1, 2002. Gulfstream was not required to prove, and made no effort to demonstrate, that each (or any) of the employees actually opened the envelope, read the contents, found buried among its 5500 words the single passage on which the company relies, or understood that under Georgia law that passage meant that the DRP was not, as its title stated, a "Corporate Policy," but instead constituted an "offer," a term never used in the DRP at all.[2]

The ordinary rule of contract law is that an offeree's actions do not create a contract unless the offeree had actual knowledge both that an offer had been made and that those actions would constitute agreement to that offer. Restatement (Second) of Contract, § 23 cmt. c (1981). Gulfstream prevailed in the court of appeals precisely because it persuaded the Eleventh Circuit that under Georgia contract law there is no such knowledge requirement, an interpretation of state law which we do not in this Court dispute. It was for precisely that reason that the court of appeals emphatically refused to permit the employee-specific inquiry that would be necessary to determine whether any employee understood that an offer to contract had been made or that offer merely by going to work in August, 2002. (Pet. App. 16-17 n.12).

II. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS AS TO WHETHER WAIVERS OF PROCEDURAL RIGHTS UNDER FEDERAL EMPLOYMENT STATUTES MUST BE KNOWING AND VOLUNTARY

Respondents acknowledge that the Sixth Circuit has repeatedly adopted a "knowing and voluntary" requirement,

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[2] Gulfstream has never claimed that its employees could have known, when the modified DRP was put into effect on April 10, 2003, that hundreds of them were to be permanently laid off the very next day; those impending layoffs were a closely guarded secret.

both in its en banc decision in *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir 2003) (en banc), and in invalidating the arbitration agreement in *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 381 (6th Cir. 2005). (R.Br. 16-17; R.Br. 17 n.7 (objecting that the en banc decision in *Morrison* was "misguided")). Respondent argues, however, that within the Sixth Circuit there actually is an intra-circuit split, relying on *Cooper v. MRM Investment Co.*, 367 F.3d 493 (6th Cir. 2004).

Far from rejecting the Sixth Circuit's knowing and voluntary rule, *Cooper* actually applied that very standard.[3] Respondents contend that *Cooper* disagreed with *Walker's* (subsequent) interpretation of *Morrison*. (R.Br. 16). But *Cooper* does not even purport to interpret *Morrison*; *Cooper* never refers to the decision in *Morrison* at all. District courts in the Sixth Circuit today apply *Morrison* and the most recent decision in *Walker* as binding circuit precedent.[4]

Respondents argue that *Cooper* held that

> even if a knowing and voluntary waiver of jury trial rights were required, it would necessarily be met *whenever* a party entered an agreement to arbitrate, because "a party who enters an arbitration agreement necessarily consents to the clear and obvious consequence: the surrender of his right to go to trial." [367 F.3d] at 508.

(R.Br. 16) (emphasis in original). But the issue in the instant case is not (as in *Cooper*) whether the existence of a knowing waiver of the right to trial can be established by showing that a worker knowingly agreed to binding

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[3] 367 F.3d at 508 (agreement valid "even if . . . a contractual waiver of the right to a jury trial must be 'knowing and voluntary' "), 508 ("As to the 'clear' or 'knowing and voluntary' character of the waiver of a judicial forum, the MRM agreement is short, clear and embodied in a separate document, not buried in a lengthy handbook.")

[4] *E.g., Hardin v. Morningside of Jackson, L.L.C.*, 2006 WL 768411 *7 (W.D.Tenn.); *Gonzalez v. Rent-A-Center*, 2005 WL 1353883 *3-*4 (N.D.Ohio).

arbitration. The threshold question here is whether the employer must show that the employee actually knew that he or she was entering into an agreement at all. In *Cooper* that knowledge was undisputed; the arbitration agreement in *Cooper* expressly and repeatedly used the words "I agree," and the employee had affirmatively signed the document in question. 367 F.3d at 497. Thus *Cooper* rested on precisely the circumstance that is missing here – actual knowledge by the employee that he or she was making an agreement.

Respondents suggest that this Court should deny certiorari in the instant case because the Court denied review in *Walker v. Ryan's Family Steak Houses, Inc.*, 126 S. Ct. 730 (2005). The respondent in *Walker*, in opposing certiorari, insisted that no courts of appeals had ever rejected the "knowing and voluntary" standard.[5] The respondents in the instant cases take precisely the opposite position, contending that no court of appeals actually utilizes that standard. At least one of these responses must be mistaken. (In fact both are). *Walker* was not an appropriate vehicle for resolving this issue, because that decision also rested on one or more alternative grounds.[6]

Respondents acknowledge that the Ninth Circuit in *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), adopted a requirement that any waiver must be knowing. (R.Br. 19). Respondents argue that *Lai* is no longer controlling precedent in the Ninth Circuit because of the 2003 decision in *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc). (R.Br. 19-20). The issue in *Luce, Forward*, however, was only whether a waiver must be voluntary, not whether it must be knowing. Although *Luce, Forward* overruled the decision in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), that waivers must be voluntary, *Luce, Forward* expressed no criticism of the requirement in *Lai*

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[5] Respondent's Brief in Opposition, No. 04-1672, pp. 5-6.

[6] Respondent's Brief in Opposition, No. 04-1672, pp. 6-15.

that waivers must be knowing. 345 F.3d at 749 n.6 (summarizing *Lai*). Since 2003 the Ninth Circuit has repeatedly refused to extend *Luce, Forward*, emphasizing that its holding was "narrow" and dealt solely with the issue of voluntariness.[7] District courts continue to treat *Lai* as stating the controlling Ninth Circuit standard regarding knowledge.[8]

Respondents acknowledge that the First Circuit holds that waivers of procedural rights under federal employment laws must meet certain minimum *federal* standards (R.Br. 21-23), a holding emphatically rejected by the Eleventh Circuit, which insists that states may set whatever standards they please. Respondents argue, however, that they would prevail even under the First Circuit standard, relying on *Rosenberg v. Merrill Lynch, Pierce, Fedder, & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999). (R.Br. 21-22). In *Rosenberg* there was no question that the employee had knowingly entered into an arbitration agreement; she had signed a form which began "I agree to arbitrate any dispute . . . that may arise between me and my firm. . . . " 170 F.3d at 4. The issue in *Rosenberg* was whether that agreement encompassed employment discrimination claims. The First Circuit held that (regardless of state contract law) federal law sets a minimum standard of clarity for agreements waiving the right to sue in federal

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[7] *Ingle v. Circuit City*, 408 F.3d 592, 595 (9th Cir. 2005) ("Our decision in *Luce Forward* was narrow. We considered only whether the Civil Rights Act of 1991 precluded employers from requiring employees . . . to waive their right to bring future Title VII cases in federal court."), 595 ("*Luce Forward* was a narrowly written decision overruling *Duffield*"); *Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060, 1064 (9th Cir. 2005) (refusing to extend *Luce, Forward*); *Siordia v. Circuit City Stores, Inc.*, 2005 WL 1368083 *1 (9th Cir.) (refusing to extend *Luce, Forward*).

[8] *E.g., Taylor v. Ash Grove Cement Co.*, 2004 WL 1382726 *4 (D.Or.); *Gaines v. Mr. Formal, Inc.*, 2004 WL 1722033 *1 (D.Or.).

court, and that the materials in *Rosenberg* failed to meet that standard.[9]

Respondents argue that the circumstances of this case would be sufficient in the First Circuit because *Rosenberg* required only efforts to provide notice to, not actual knowledge by, an employee, and argue that they provided such notice. (R.Br. 22-23). But the *Rosenberg* notice requirement governs cases in which there was undeniably an agreement, and where the dispute is only about which claims were within the scope of that agreement. A different standard applies in the First Circuit where, as here, the dispute concerns whether there was an agreement at all. In a case such as this the First Circuit requires the employer to show that "the agreement to arbitrate was, indeed, . . . *intentional*." *Ramirez-De-Arellano v. American Airlines, Inc.*, 133 F.3d 89, 91 (1st Cir. 1997) (emphasis added). Respondents have never argued, and the courts below never held, that any of Gulfstream's employees *intended* by the mere act of going to work on August 1, 2002, to make some sort of agreement.[10]

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[9] 170 F.3d at 20 ("The question then becomes which party should bear the risk of [the employee's] ignorance. Given Congress's concern that agreements to arbitrate employment discrimination claims should be enforced only where 'appropriate,' . . . Merrill Lynch should . . . bear that risk.")

[10] Respondents rely on a statement in the court of appeals decision that "Gulfstream's DRP did provide extensive details regarding *its* arbitration *policy*." (R.Br. 23, *quoting* Pet. App. 26a-27a n.18) (emphasis added). That might satisfy the notice requirement of *Rosenberg* if the issue here were *which* disputes were covered by an agreement whose existence was not in question.

But the issue here is whether there was an agreement at all. The quoted passage has no bearing on whether, as required by *Ramirez-De-Arellano*, the employees had intentionally entered into an agreement. To the contrary, that passage refers to the details of a "policy" (not an agreement) and uses the possessive pronoun "its" (referring to the policy of Gulfstream) not "their" (which would be appropriate for any agreement made by the employees).

Respondents acknowledge that decisions in the Second and Tenth Circuits hold as a matter of federal law that the right to have federal employment claims decided by a jury – a right expressly included in the text of Title VII[11] and the ADEA[12] – can be waived only through a knowing and voluntary act. (R.Br. 14). Respondents contend that these cases are distinguishable because in the instant case the language stripping Gulfstream employees of that right was contained, not in an ordinary contract, but in an arbitration agreement. (R.Br. 14). But such a distinction is simply inconsistent with the text of the FAA and with the decisions of this Court, both of which make clear that under the FAA the validity of a purported arbitration agreement is to be governed by the *same* standard that would apply to other contracts. 9 U.S.C. § 2; *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1209 (2006) ("arbitration agreements [are to] be treated like all other contracts.")

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE DIFFERENCES AMONG STATE COURTS AS TO WHETHER WAIVERS OF PROCEDURAL RIGHTS UNDER FEDERAL EMPLOYMENT STATUTES MUST BE KNOWING AND VOLUNTARY

Respondents do not dispute our description of the law in eight states which – unlike Georgia – hold that a waiver of the sort involved in the instant case cannot be enforced if it was not knowing and voluntary. Respondents argue only that it is entirely appropriate that the validity of such a waiver would vary from state to state. (R.Br. 24-25).

Ordinary contract claims properly depend upon, and vary with, state contract law. But the Question Presented

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[11] 42 U.S.C. § 1981a(c).

[12] 29 U.S.C. § 626(c)(2).

concerns the validity of waivers of rights expressly conferred by federal employment statutes, here Title VII, ERISA, the Age Discrimination in Employment Act, and the Fair Labor Standards Act. Today a federal judge in California, New Jersey, Washington, Missouri, Connecticut, West Virginia, Montana, or Utah would refuse to enforce a waiver of those rights that was not knowing and voluntary, and would proceed to decide on the merits a plaintiff's federal employment claims. But a federal judge presented with the identical circumstances in Georgia would be required by the decision below to dismiss the same federal lawsuit.

This Court has on repeated occasions recognized the importance of a uniform national application of federal civil rights laws. *E.g.*, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 754 (1998); *Felder v. Casey*, 487 U.S. 131, 148 (1988); *Patterson v. McLean Credit Union*, 491 U.S. 164, 182-83 (1989). If the Eleventh Circuit was correct when it held there are no minimum federal standards governing waivers of federal procedural rights, then the degree to which workers asserting federal employment claims are protected from coercive or deceptive waivers will vary from state to state. But whether the Eleventh Circuit was correct is of course the very Question Presented. The significance of the undisputed differences in state law standards is inextricably intertwined with the merits of this case.

IV. THE QUESTION PRESENTED IS SUBSTANTIAL

The Question Presented concerns whether federal law imposes limitations on the validity of arrangements (whether involving arbitration or not) that strip employees of their procedural rights under federal employment laws, most fundamentally the right to enforce those laws in federal court. The Eleventh Circuit held that federal plaintiffs must look solely to state law for protection against coercive or manipulative schemes.

The decisions of this Court, however, make clear that the protection of the federal procedural rights at issue in this case is not the exclusive province of the states. In *Wright v. Universal Maritime Service, Inc.*, 525 U.S. 70 (1998), this Court addressed the question of whether a particular collective bargaining agreement should be construed to compel the covered employees to enforce their rights under the Americans With Disabilities Act solely through binding arbitration. Although the collective bargaining agreement had been entered into in South Carolina, this Court did not look to that state's contract law in construing the agreement. Rather, the Court fashioned a uniform *federal* rule of construction, holding that "[*Alexander v.*] *Gardner-Denver* [, 415 U.S. 36 (1974)] at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected." 525 U.S. at 80.

As the First Circuit has correctly recognized, the same federal right is implicated by a direct agreement (or, in this case, asserted agreement) between the employer and employee concerned. *Rosenberg*, 170 F.3d at 21. An express right to obtain redress in federal court is contained in each of the statutes relied on by the plaintiffs in the instant case – Title VII, the Fair Labor Standards Act, the Age Discrimination in Employment Act, and ERISA. In the litigaton below, plaintiffs expressly but unsuccessfully objected that they were being denied "statutory trial rights, such as access to the courts." (Pet. App. 16).

It cannot be the case, as the Eleventh Circuit held, that the standards governing the validity of agreements that strip workers of "the right to a federal judicial forum" depend solely on state law. Georgia may be free, where state law claims alone are at stake, to enforce arbitration agreements (or other contracts) even if they were obtained at gunpoint or were written in Latin. But where, as here, the disputed agreement would operate to bar a federal plaintiff from enforcing federal laws in federal court, there assuredly are minimum federal standards that must be

met. Certiorari should be granted to resolve what those federal standards are.[13]

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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[13] Respondents suggest that *Wright* held that, unlike collective bargaining agreements, waivers of federal procedural rights in individual arbitration agreements are never subject to any federal standards. (R.Br. 12 and n.4.). That is not correct. *Wright* held only that certain decisions under the National Labor Relations Act, which establish the standard for interpreting collective bargaining agreements, did not, of course, apply to other types of agreements. 525 U.S. at 80-81.